Supreme Court, U.S.
FILED

95-820 NOV 22 1995

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

CATHERINE BAKER KNOLL, et al.
Petitioners

v.

ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN, et al.,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves the administration of the Medicaid program, a jointly funded federal-state program for providing health care to poor people. The questions presented are:

1. Whether, in construing the governing federal statute, a court may rely on an informal agency announcement to impose upon participating States conditions which are not found in the statute and which are against state law?

2. Whether a court owes any deference to an agency's interpretation of its own regulation, when that interpretation is a change from the agency's previous position and is announced only in a brief filed in litigation?

3. Whether the Hyde Amendment confers any rule-making authority on the Secretary of Health and Human Services?

LIST OF PARTIES

The petitioners are Catherine Baker Knoll, the Treasurer of Pennsylvania; Feather O. Houstoun, Secretary of the Pennsylvania Department of Public Welfare[1]; Darlene Collins, Deputy Secretary of the Office of Medical Assistance in the Department of Public Welfare[2]; and Thomas J. Ridge, the Governor of Pennsylvania.[3]

The respondents are the Elizabeth Blackwell Health Center for Women, the Greater Philadelphia Women's Medical Fund, and CHOICE.

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[1]Substituted for former Secretary Karen F. Snider, see Sup. Ct. R. 35.3.

[2]Substituted for former Deputy Secretary Sherry Knowlton, see Sup. Ct. R. 35.3.

[3]Substituted for former Governor Robert P. Casey, see Sup. Ct. R. 35.3.

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STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was filed on July 25, 1995, and the petitioners timely filed a petition for rehearing. The Court of Appeals denied rehearing on August 24, 1995, Pet. App. 75a, and this petition is being filed within 90 days thereafter. The Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

1. The 1993-94 Hyde Amendment provides:

> None of the funds appropriated under this Act shall be expended for any abortion except when it is made known to the Federal entity or official to which funds are appropriated under this Act that such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest.

Pub.L. No. 103-112, §509, 107 Stat. 1082, 1113 (1993); Pub.L. No. 103-333, §509, 108 Stat. 2539, 2573 (1994) (same text).

2. The relevant provisions of the Pennsylvania Abortion Control Act, 18 Pa. Cons. Stat. §§3201 through 3220 are as follows:

> **§3215. Publicly owned facilities; public officials and public funds**
>
> * * * *
>
> **(c) Public funds.**--No Commonwealth funds and no Federal funds which are appropriated by the Commonwealth shall be expended by any State or local government agency for the performance of abortion, except:
>
> (1) When abortion is necessary to avert the death of the mother on certification by a physician. When such physician will perform

the abortion or has a pecuniary or proprietary interest in the abortion there shall be a separate certification from a physician who has no such interest.

(2) When abortion is performed in the case of pregnancy caused by rape which, prior to the performance of the abortion, has been reported, together with the identity of the offender, if known, to a law enforcement agency having the requisite jurisdiction and has been personally reported by the victim.

(3) When abortion is performed in the case of pregnancy caused by incest which, prior to the performance of the abortion, has been personally reported by the victim to a law enforcement agency having the requisite jurisdiction, or, in the case of a minor, to the county child protective service agency and the other party to the incestuous act has been named in such report.

As amended 1988, March 25, P.L. 262, No. 31, §9, effective in 30 days.

* * * *

(j) Required statements.--No Commonwealth agency shall make any payment from Federal or State funds appropriated by the Commonwealth for the performance of any abortion pursuant to subsection (c)(2) or (3) unless the Commonwealth agency first:

(1) receives from the physician or facility seeking payment a statement signed by the physician performing the abortion stating that, prior to performing the abortion, he obtained a non-notarized, signed statement from the pregnant woman stating that she was a victim of rape or incest, as the case may be, and that she reported the crime, including the identity of the offender, if known, to a law enforcement agency having the requisite jurisdiction or, in the case of incest where a pregnant minor is the victim, to the county child protective service agency and stating the name of the law enforcement agency or child protective service agency to which the report was made and the date such report was made;

(2) receives from the physician or facility seeking payment, the signed statement of the pregnant woman which is described in paragraph (1). The statement shall bear the notice that any false statements made therein are punishable by law and shall state that the pregnant woman is aware that the false reports to law enforcement authorities are punishable by law; and

(3) verifies with the law enforcement agency or child protective service agency named in the statement of the pregnant woman whether a report of rape or incest was filed with the agency in accordance with the statement.

> The Commonwealth agency shall report any evidence of false statements, of false reports to law enforcement authorities or of fraud in the procurement or attempted procurement of any payment from Federal or State funds appropriated by the Commonwealth pursuant to this section to the district attorney of appropriate jurisdiction and, where appropriate, to the Attorney General.
>
> Added 1988 March 25, P.L. 262, No. 31, §9, effective in 30 days.

3. The relevant provisions of HHS' regulations are as follows:

> **§441.203 Life of the mother would be endangered.**
>
> FFP is available in expenditures for an abortion when a physician has found, and certified in writing to the Medicaid agency, that on the basis of his professional judgment, the life of the mother would be endangered if the fetus were carried to term. The certification must contain the name and address of the patient.
>
> * * * *
>
> **§441.206 Documentation needed by the Medicaid agency.**
>
> FFP is not available in any expenditures for abortions or other medical

> procedures otherwise provided for under §441.203 if the Medicaid agency has paid without first having received the certifications and documentation specified in that section.

42 C.F.R. §§441.203, 441.206.

STATEMENT OF THE CASE

1. This action challenges provisions of Pennsylvania law governing publicly-funded abortions under the Medical Assistance or "Medicaid" program established by Title XIX of the Social Security Act, 42 U.S.C. §§1396 *et seq*. The petitioners are the Governor of Pennsylvania and other state officials responsible for administering the Medicaid program in Pennsylvania. The respondents are the Elizabeth Blackwell Health Center for Women, a facility that performs abortions; the Greater Women's Medical Fund, an organization that loans money to women for abortions; and CHOICE, a telephone hotline. Pet. App. 4a.

Since 1988, Pennsylvania's Medicaid program has funded abortions for women who are pregnant as a result of rape or incest, or where an abortion is necessary to save the mother's life. 18 Pa.Cons.Stat. §3215(c), (j).[4] The Pennsylvania statute requires, however, that, in a case of rape or incest, the sexual assault be reported to the appropriate authorities; and that, in a case of danger to the life of the mother, the danger be certified by a physician with no financial interest in performing the abortion. *Ibid.* The respondents challenged these requirements as inconsistent with federal law.

The Medicaid Program. Medicaid is a venture in "cooperative federalism," *King v. Smith*, 392 U.S. 309, 316 (1967), in which the federal government and participating States undertake to provide medical care to poor people. 42 U.S.C. §1396. State participation in Medicaid is voluntary, but if a State does participate, it must abide by the terms of

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[4]Subsections 3215(c) and (j) are reprinted at p. 3-6 above.

Title XIX and its implementing regulations. *Wilder v. Virginia Hospital Association*, 496 U.S. 498, 502 (1990).

In order to receive the federal money made available by Title XIX, a State must submit to the Secretary of Health and Human Services (HHS), and have approved by her, a "state plan" for medical assistance, the contents of which are prescribed by 42 U.S.C. §1396a. Among other things, States must provide coverage for inpatient hospital services, outpatient hospital services, and physician services. 42 U.S.C. §1396a(a)(10)(A), *incorporating* 42 U.S.C. §1396d(a)(1)-(5). States must also, however, establish "reasonable standards ... for determining eligibility for ... medical assistance," 42 U.S.C. §1396a(a)(17), and must "provide such safeguards as may be necessary to assure that eligibility for care and services ... will be determined." 42 U.S.C. §1396a(a)(19).

The Hyde Amendment. With respect to abortion, Title XIX itself is silent, but since 1976, Congress has restricted the use of federal funds to pay for Medicaid abortions. This restriction, commonly called the "Hyde Amendment," appears not in Title XIX but in each annual appropriations act, and its exact terms have varied from year to year.[5] The Court has held that participating States are not required under Title XIX to pay for any abortions for which federal reimbursement is not available under the Hyde Amendment. *Harris v. McRae*,

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[5]From 1976 through 1992, the Hyde Amendment has allowed federal funding for Medicaid abortions as follows: 1976--to save the life of the mother, Pub.L. 94-439, §209, 90 Stat. 1418, 1434 (1976); 1977-78--life of the mother, promptly reported rape or incest, and physical health when certified by two physicians, e.g., Pub.L. 95-205, §101, 91 Stat. 1460 (1977); 1979-80--life of the mother and promptly reported rape or incest, e.g., Pub.L. 96-86, §118, 93 Stat. 656, 652 (1979); 1981-92--life of the mother, e.g., Pub.L. 97-12, §109, 95 Stat. 14, 96 (1981).

448 U.S. 297 (1980). On the other hand, most lower courts, including the Third Circuit, have held that States are required to fund those abortions for which federal reimbursement is available under the Hyde Amendment. E.g., *Roe v. Casey*, 623 F.2d 289 (3d Cir. 1980).[6]

The current version of the Hyde Amendment was first enacted for the 1994 budget year. It states, in its entirety:

> None of the funds appropriated under this Act shall be expended for any abortion except when it is made known to the Federal entity or official to which funds are appropriated under this Act that such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest.

Pub. L. No. 103-333, §509, 108 Stat. 2539, 2573 (1994); Pub. L. No. 103-112, §509, 107 Stat. 1082, 1113 (1993)(same).

The HHS Response. In 1977, shortly after the enactment of the first Hyde Amendment--which authorized federal funding only for abortions to save the life of the mother--the Secretary of HHS promulgated regulations requiring States in such cases to obtain a written certification from "a physician ... that on the basis of his professional judgment, the life of the mother would be endangered if the fetus were carried to term." 42 C.F.R. §§441.203, 441.206.

In 1993, after the enactment of the most recent version of the Hyde Amendment--which expanded federal funding to

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[6]The Court has twice found it unnecessary to reach this question, *see Harris v. McRae*, 448 U.S. 297, 307 n.11; *Beal v. Doe*, 432 U.S. 438, 444-45 (1977), and the petitioners do not raise it now.

include abortions for victims of rape or incest--the Secretary enacted no new regulations. However, her subordinate, the Director of the Medicaid Bureau of the Health Care Financing Administration within the Department of Health and Human Services, sent a letter to all state Medicaid directors. Pet. App. 76a-79a. This letter notified the States of the latest revision to the Hyde Amendment, and directed them to amend their state plans to include coverage for abortions of pregnancies resulting from rape or incest.

The letter authorized the States to impose "reasonable reporting requirements ... on recipients or providers" to assure themselves that an abortion was in fact sought as a result of rape or incest. However, the letter required the States to waive such reporting requirements "if the treating physician certifies that in his or her professional opinion, the patient was unable, for physical or psychological reasons, to comply with the requirement." The Director repeated these directives in a second letter early in 1994. Pet. App. 80a-83a.

The Pennsylvania Statute. Pennsylvania's statute has been in effect since 1988. It provides that, where a Medicaid-funded abortion is sought on the grounds of a danger to the life of the mother, the danger be certified by a physician who will neither perform the abortion nor have a "pecuniary or proprietary interest" in it. 18 Pa.Cons.Stat. §3215(c)(1). In the case of pregnancies resulting from rape or incest, the statute requires 1) that the woman sign a statement that she was the victim of rape or incest and that she reported the crime to the appropriate agency, including the offender's identity, if known; 2) that the treating physician obtain this statement before performing the abortion; and 3) that the state Medicaid agency verify that the crime was reported. 18 Pa.Cons.Stat. §§3215(c)(2)-(3), 3215(j). The statute contains no provision for waiving these requirements.

2. The respondents challenged these provisions as being inconsistent with the Hyde Amendment.[7] The District Court agreed, and granted summary judgment in their favor. The District Court held that the case was "squarely governed," Pet. App. 70a, by *Roe v. Casey*, *supra*, in which the Third Circuit had held that States are required to cover any abortions for which federal funding is available under the Hyde Amendment. The District Court held that Pennsylvania's reporting and certification requirements were an attempt to impose "additional limits" on coverage not found in the Hyde Amendment, Pet. App. 70a, and he therefore enjoined them in their entirety. Pet. App. 73a.

3. A divided Court of Appeals affirmed the District Court in part and reversed in part. The Court of Appeals first invited the views of the Secretary of HHS, Pet. App. 16a, and the United States submitted a brief amicus curiae on her behalf.

a. On Pennsylvania's rape-and-incest reporting requirements, HHS adhered to the directive given in the two letters sent by the Director of the Medicaid Bureau: that such reporting requirements are permissible under the Hyde Amendment, but that they must be waived where the treating physician certifies that the patient was physically or psychologically unable to comply with them. *See* Pet. App. 78a. Pennsylvania's statute, which does not provide for such a waiver, was in HHS's view invalid to this extent.

On Pennsylvania's requirement that a danger to the life of the mother be certified by a *disinterested* physician, HHS pointed to its regulation codified at 42 C.F.R. §441.203.

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[7]They claimed also that these provisions violated Title XIX and the Fourteenth Amendment's Due Process Clause. Neither the District Court nor the Court of Appeals reached these claims.

According to HHS, this regulation, which requires the States to obtain such a certification from "a physician," *ibid*, *see* 42 C.F.R. §441.206, also requires the States to accept the certification from *any* physician. Pennsylvania's statute was thus, in HHS's view, invalid to the extent that it refused to accept the certification of a performing or financially interested physician.

b. All members of the Court of Appeals agreed in rejecting the reasoning of the District Court and the respondents--that the Hyde Amendment itself invalidates Pennsylvania's requirements in their entirety. The Court of Appeals could find no support for this holding in the text of the Hyde Amendment, in its legislative history, or in its own earlier decision, *Roe v. Casey*, *supra*, on which the District Court had relied. Pet. App. 20a-23a (majority opinion), 38a (Nygaard, J., dissenting).

The panel majority likewise rejected the petitioners' reliance on *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), for the proposition that, when Congress wishes to impose conditions on the grant of federal funds to States, it must "speak with a clear voice" and impose conditions "unambiguously." *Id.*, 451 U.S. at 17. The petitioners argued that, in the absence of language in the Hyde Amendment unambiguously forbidding Pennsylvania's reporting and certification requirements, those requirements should be upheld. The majority, however, said that Pennsylvania "should have realized that reporting requirements could be so onerous as to defeat Congress' intent that Medicaid funding be provided for the categories of abortions in question." Pet. App. 18a.

The majority then turned for guidance to HHS, and deferred to its positions. Pet. App. 4a-5a. On the issue of Pennsylvania's rape-and-incest reporting requirements, the majority looked to the letters sent out by the Director of the

Medicaid Bureau. Pet. App. 26a-27a. The majority regarded these directives as non-binding "interpretive rules" which "clarif[y] and explain[] existing law," Pet. App. 27a, rather than "legislative rules" adopted after compliance with notice-and-comment requirements and having the force of law. Pet. App. 27a-28a. Nevertheless, the majority held that these letters were entitled to deference under the principles of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Pet. App. 28a-30a.

On the issue of Pennsylvania's physician certification requirement, the majority looked to the construction of 42 C.F.R. §441.203 offered by the Secretary in her amicus brief to the Court of Appeals. Pet. App. 31a. Giving "substantial deference to an agency's construction of its own regulation," Pet. App. 32a, and finding the Secretary's construction otherwise reasonable, the majority again deferred to the position of HHS. Pet. App. 32a-35a.

The Court of Appeals thus held that Pennsylvania's rape-and-incest reporting requirements are invalid only to the extent that they do not contain a waiver provision, and that Pennsylvania's physician certification requirement is invalid only to the extent that it requires certification by a disinterested physician. Pet. App. 36a.

c. In a lengthy dissent, Pet. App. 37a-66a, Judge Nygaard argued that "what the Secretary would have us give her is not deference due, but rather deference run amok." Pet. App. 37a. Turning first to the two letters from the Director of the Medicaid Bureau, Judge Nygaard rejected the idea that they could properly be considered "interpretive" of the Hyde Amendment.

> [T]here is simply no way that the Hyde Amendment itself can be construed to require or forbid reporting and certification

> requirements, with or without a waiver provision. Even the majority recognizes as much.... In the absence of the two letters, there would be no plausible argument that Pennsylvania's reporting and certification requirements are invalid.

Pet. App. 43a. The two letters are therefore not interpretive, but "distinctly *legislative* in character." *Ibid.* (emphasis in original). Judge Nygaard regarded these letters as "'spurious rules,' that is, rules that go beyond mere interpretation of existing law and purport to have binding effect, yet were not submitted to notice and comment rulemaking." Pet. App. 44a. Such rules, in his view, have no validity whatever. *Ibid.*

Even on the theory that the letters were legitimate interpretive rules, the majority erred, in Judge Nygaard's view, in extending to them the full deference called for under *Chevron*. Pet. App. 49a-60a. Such deference should extend only to validly adopted legislative rules, which have the force of law. Interpretive rules, on the other hand, should be reviewed under the standard of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), in which they receive only the deference which their inherent persuasiveness commands. *Ibid.* Judge Nygaard, reviewing the letters under this standard, found them unpersuasive. Pet. App. 60a-62a.

Judge Nygaard found further support for his position in ideas of federalism. Pet. App. 62a-64a. He pointed out that in this case, HHS is attempting not just to regulate private conduct but to override an otherwise valid state statute. One of the underpinnings of *Chevron* deference is a preference for policymaking by bureaucrats--who are at least theoretically accountable to the electorate--over judges, who are not. Pet. App. 62a-63a. But the choice here is between policymaking by unelected bureaucrats or by elected officials,

and Judge Nygaard would have held that an interpretive rule cannot displace state law. Pet. 63a-64a.

Finally, turning to Pennsylvania's physician certification requirement, Judge Nygaard would not have deferred to the Secretary's regulation on the ground that she had no authority to adopt it. Pet. App. 64a-66a. Judge Nygaard conceded that the Secretary

> has exceptionally broad authority to interpret the Medicaid Act itself, ... but the Medicaid Act is not at issue here. The statutory text under interpretation is the Hyde Amendment to the appropriations bill that funds the Medicaid program, and ... the Hyde Amendment contains no provision enabling the Secretary to make regulations with the force of law.

Pet. App. 64a-65a. Judge Nygaard would therefore have upheld Pennsylvania's reporting and certification requirements in their entirety.

4. The petitioners requested rehearing by the panel or by the Court of Appeals sitting en banc, relying largely on the issues raised in the dissent. By an equally divided vote, the Court of Appeals denied rehearing en banc, and the panel likewise denied rehearing. Pet. App. 75a.

REASONS FOR ALLOWING THE WRIT

I. THE COURT OF APPEALS HAS DECIDED IMPORTANT ISSUES OF FEDERALISM AND ADMINISTRATIVE LAW IN A WAY THAT CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

1. The validity of Pennsylvania's rape-and-incest reporting requirements is fundamentally an issue of federal statutory construction: does the Hyde Amendment, or does it not, forbid such requirements? All of the members of the Court of Appeals agreed that the Hyde Amendment, standing alone, does not: neither its text, nor its legislative history, nor the cases construing it support such a reading. App. 20a-23a (majority opinion), 38a (Nygaard, J., dissenting). The Hyde Amendment simply does not address the issue.

That, we submit, should have been the end of the matter. The Court of Appeals went further, however, relying on informal agency directives to read into the Hyde Amendment conditions which appear neither in the statute nor in validly adopted administrative regulations. In doing so, the Court of Appeals did not simply extend an unwarranted deference to the decisions of a sub-cabinet level official, but allowed those decisions to override an otherwise valid state statute. The Court of Appeals thus not only erred, but upset the balance of federal-state relations in a way which justifies the Court's review.

The Court of Appeals' decision is inconsistent with the approach the Court has taken to federal-state relations in general, and federal-state funding programs in particular. The Court has consistently recognized the "fundamental principle" that "our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). This system preserves

"numerous advantages" to the people, but "[p]erhaps the principal benefit of the federalist system is a check on abuses of government." *Id.*, at 458. "In the tension between federal and state power lies the promise of liberty." *Id.*, at 459.

For this reason, while the Court recognizes that "Congress may legislate in areas traditionally regulated by the States ... [i]t is a power that we must assume Congress does not exercise lightly." *Id.*, at 460. Therefore, "if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Ibid, quoting Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)(internal quotation marks omitted).

The same rule applies in grant programs like Medicaid: in setting conditions for participating States, "Congress [must] speak with a clear voice." *Pennhurst*, 451 U.S. at 17. A program like Medicaid

> is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.... There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.

Ibid.

We recognize, of course, that Congress has delegated substantial authority to the Secretary of HHS to administer the Medicaid program, and that participating States must comply not only with the statute, but with the Secretary's validly promulgated regulations. *Wilder*, 496 U.S. at 502. But there

are no such regulations governing rape-and-incest reporting; there are only letters from a mid-level federal administrator.

The Court of Appeals' decision--to allow a bureaucratic fiat to displace the act of elected state legislators--undercuts federalism in a way that goes far beyond the immediate issue of the Hyde Amendment. The Hyde Amendment, important as it is, affects only a tiny part of the massive Medicaid program, which itself is only one of myriad federal-state funding programs. *See, e.g.*, *Maine v. Thiboutot*, 448 U.S. 1, 22-23, 35-37 (1980)(Powell, J., dissenting)(listing such programs). Under the Court of Appeals' decision, every aspect of each of these programs is now subject to rulemaking-by-letter. The Court should therefore review this important issue.

2. Intertwined with the issue of federalism, and central to the Court of Appeals' analysis, are technical but important issues of federal administrative law, which the Court of Appeals resolved in ways that conflict with the decisions of this Court and of other courts of appeals. The central issue here is the distinction, created by Section 553 of the Administrative Procedures Act (APA), 5 U.S.C. §553, between "substantive" or "legislative" rules on the one hand, and "interpretive" rules on the other.

The Court, and other courts of appeals, have suggested that the distinction between the two types of rules is one of substance: legislative rules go beyond the terms of the statute itself to create rights, impose obligations, or implement a statutory scheme; while interpretive rules merely clarify or explain existing law. *E.g., Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979); *American Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993); *Alcaraz v. Block*, 746 F.2d 593, 613 (9th Cir. 1984). Legislative rules, to be valid, must be promulgated pursuant to a grant of rulemaking authority from the Congress, and

must conform to the notice-and-comment procedures of the APA, while interpretive rules need not. *E.g., Chrysler Corp.*, 441 U.S. at 302-03.

The Third Circuit, however, defines legislative and interpretive rules solely in procedural terms: any rule not promulgated in accordance with APA notice-and-comment procedures is an interpretive rule, regardless of its character. Pet. App. 44a-45a (Nygaard, J., dissenting)(citing cases). In this case, this analytical error led the Court of Appeals to mischaracterize the HHS letters: the Court of Appeals saw them as valid interpretive rules to which some level of deference was owed, Pet. App. 27a-30a, rather than--what they really are--*invalid attempts* at legislative rulemaking which command no deference at all. Pet. App. 43a-44a (Nygaard, J., dissenting). *Cf. Jerri's Ceramic Arts, Inc. v. Consumer Product Safety Comm.*, 874 F.2d 205, 208 (4th Cir. 1989)(so-called interpretive rule really legislative, and must be set aside where issued without compliance with procedural requirements). The Court should review the case to resolve this conflict.

Even assuming that the Court of Appeals correctly viewed the HHS letters as interpretive rules, there remains the question of what level of deference a reviewing court should extend to such rules. This is the subject of some confusion among the lower courts. The Court of Appeals found some support for its position that such rules are entitled to the virtually conclusive deference called for under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Pet. App. 29a (citing cases). On the other hand, many courts agree with the dissenting judge that interpretive rules should be reviewed under the standard set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) and subsequent cases--that such rules are not controlling, but that courts are entitled to give them whatever weight their inherent persuasiveness commands. *Id.*, at 140. *See* Pet. App. 52a-

55a (Nygaard, J., dissenting)(collecting cases). Commentators too have noted this confusion. *See, e.g., Note, The Revival of Skidmore v. Swift: Judicial Deference to Agency Interpretations After EEOC v. Aramco*, 42 Duke L.J. 166 (1992). Here again the Court's guidance is needed.

The Court of Appeals in this case has allowed a federal bureaucrat to override state law and impose on a State funding conditions which Congress never expressed unambiguously--or at all--and which have never been promulgated as regulations. The decision of the Court of Appeals in this case undercuts not only the values of federalism which the Court sought to protect in *Pennhurst* and similar cases, but also the values which underlie the notice-and-comment requirements of the Administrative Procedures Act. *See* Pet. App. 46a-49a (Nygaard, J., dissenting)(APA procedures promote fairness, accuracy, thoroughness and respect for law). The Court should review the case to reassert these values and to resolve the conflicts on these issues among the lower courts.

II. THE COURT SHOULD RESOLVE THE DIFFICULT AND RECURRING ISSUE OF WHAT DEFERENCE IS DUE TO AN AGENCY POSITION FIRST ASSERTED IN LITIGATION.

Pennsylvania's statute requires that, where a Medicaid-funded abortion is sought on the grounds of a danger to the life of the mother, the danger be certified by a physician who will neither perform, nor have a financial interest in, the abortion. 18 Pa.Cons.Stat. §3215(c). In striking down this provision, the Court of Appeals relied on HHS's construction of the regulation codified at 42 C.F.R. §441.203. This regulation requires States in such cases to obtain the certification of "a physician," *ibid*, and the Court of Appeals

accepted HHS's view, asserted in its amicus brief, that this requires the States to accept the certification of *"any* physician." Pet. App. 31a (emphasis in original).

Ordinarily, as the Court of Appeals said, an agency's construction of its own regulation is entitled to substantial, if indeed not controlling, deference. Pet. App. 32a, *citing Thomas Jefferson University v. Shalala*, ___ U.S. ___ , 114 S.Ct. 2381, 2386-87 (1994). But the circumstances here are unusual. The HHS regulation has been on the books since 1977, Pet. App. 33a, and Pennsylvania's statute has been in effect since 1988, yet HHS, which is responsible for overseeing Pennsylvania's Medicaid program, *see* 42 U.S.C. §§1396a(b), 1396c, seems never before to have raised this objection.

In recent years, the Court has several times referred to, but not resolved, the "difficult question of the deference due an agency view first precisely stated in a brief...." *John Hancock Mutual Life Ins. Co. v. Harris Trust & Savings Bank*, ___ U.S. ___, 114 S.Ct. 517, 531 (1993). *See Estate of Cowart c. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992)(same); *Martin v. Occupational Safety and Health Review Comm.*, 499 U.S. 144, 156 (1991) (agency "litigating positions" not entitled to deference). Since the issue is a recurring one, the Court should take this opportunity to address it.

III. THE EXISTENCE OF THE SECRETARY'S RULEMAKING AUTHORITY UNDER THE HYDE AMENDMENT PRESENTS AN IMPORTANT ISSUE WHICH THE COURT SHOULD RESOLVE.

Finally, there is a substantial question as to whether the Secretary of HHS has any rulemaking authority at all

under the Hyde Amendment. As the dissenting judge pointed out, the Hyde Amendment is not part of the Medicaid statute, but is part of an annual appropriations act which, on its face, delegates no rule-making authority to the Secretary. Pet. App. 65a (Nygaard, J., dissenting).

At least two other States have statutory provisions which appear to be inconsistent with HHS's physician certification regulation. See Idaho Stat., §56-209c (danger to life of the mother to be certified by two physicians); Minn. Stat. Ann., §256B.0625(16)(a) (same). The issue of the Secretary's authority to adopt regulations under the Hyde Amendment is therefore likely to recur, particularly if, as suggested above, the Court disapproves HHS's attempt at rulemaking-by-letter. The Court should take this opportunity to resolve the issue.

CONCLUSION

For these reasons, the Court should issue the writ of certiorari and, upon review, should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX

Filed: July 25, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 94-1954

ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN; GREATER PHILADELPHIA WOMEN'S MEDICAL FUND; CHOICE, on behalf of themselves and the Medicaid-eligible women of the Commonwealth of Pennsylvania to whom they provide financial, health care and counseling services

v.

CATHERINE BAKER KNOLL, Treasurer of the Commonwealth of Pennsylvania, in her official capacity; KAREN F. SNIDER, Secretary of Public Welfare of the Commonwealth of Pennsylvania, in her official capacity; SHERRY KNOWLTON, Deputy Secretary of the Office of Medical Assistance of the Commonwealth of Pennsylvania, in her official capacity; ROBERT P. CASEY, Governor of the Commonwealth of Pennsylvania, in his official capacity, and their successors

Catherine Baker Knoll, Karen F. Snider, Sherry Knowlton and Robert P. Casey,

Appellants

On Appeal from the United States
District Court for the Eastern District
of Pennsylvania
(D.C. No. CV 94-00169)

Argued January 13, 1995

Before: COWEN, NYGAARD and ALITO,
Circuit Judges

(Filed July 25, 1995)
(As Amended August 3, 1995)

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OPINION OF THE COURT

COWEN, *Circuit Judge*

The Elizabeth Blackwell Health Center for Women, a comprehensive reproductive health care facility that provides first-trimester abortions, the Greater Women's Medical Fund, a non-profit agency that provides financial assistance to low-income women in order to obtain abortions, and CHOICE, a telephone hot-line which provides information and referrals to its callers on many issues, including family planning and abortion (collectively, the "Providers"), ask this Court to declare invalid and enjoin the enforcement of sections 3215(c) and 3215(j) of the Pennsylvania Abortion Control Act, 18 Pa. Cons. Stat. Ann. §§3201-3220 (1983 & Supp. 1994), Pennsylvania's reporting and physician certification requirements for publicly-funded abortions under the Medicaid program. The Governor of Pennsylvania, the State Treasurer, the Secretary of the Pennsylvania Department of Public Welfare, and the Deputy Secretary for Medical Assistance (collectively, "the Commonwealth") appeal from the order of the district court granting the Providers' motion for summary judgment. The district court based its holding on the Providers' claim that the Pennsylvania statute is preempted by the Hyde Amendment.

We conclude that the Secretary of Health and Human Services is owed deference regarding her interpretation of the Hyde Amendment mandates. Because the Secretary has determined that reporting requirements are permissible under the Medicaid Act, as modified by the Hyde Amendment, only

if they contain a waiver provision, and since the Pennsylvania Abortion Control Act contains no such provision, we find §3215(j) of the Pennsylvania statute directly in conflict with federal law, and thus, invalid to the extent that it conflicts with the Secretary's interpretation. Furthermore, because the second-physician certification requirement pursuant to §3215(c) is contrary to a federal regulation, it is also invalid to the extent that it goes beyond the scope of that regulation.

I.

This action concerns Title XIX of the Social Security Act, commonly known as the Medicaid program, 42 U.S.C. §§1396-1396u (1988 & Supp. V 1993). The purpose of the Medicaid program is to help provide medical treatment for low-income people. Under the program, the state receives federal financial assistance in return for administering a Medicaid program that the state develops within parameters established by federal law and regulations. 42 C.F.R. §430.0 (1994).

Establishment of a Medicaid program is voluntary on the part of each state. While states are not obligated to participate in the Medicaid program, each state that chooses to do so is required to develop its own state plan which must be approved by the Secretary. In order to receive federal funds, a state's plan must conform, both on its face and as applied, with various federal requirements. 42 U.S.C. §1396a, 1396c; *see Harris v. McRae*, 448 U.S. 297, 301, 100 S. Ct. 2671, 2680 (1980); *New Jersey v. Department of Health and Human Services*, 670 F.2d 1284, 1286 (3d Cir.), *cert. denied*, 459 U.S. 824, 103 S. Ct. 56 (1982).

Under Title XIX, certain categories of medical care are mandatory, and must be provided by every state Medicaid

plan, while other categories of care are optional, and each state has the discretion to cover the service. *See* 42 U.S.C. §1396a(a)(10). By law, states are required to fund medically necessary physician services. 42 U.S.C. §§1396a(a)(10)(A), 1396d(a). Participating states must establish eligibility requirements that are "consistent with the objectives" of Title XIX. 42 U.S.C. §1396a(a)(17). "Title XIX's broadly stated primary objective [is] to enable each State, as far as practicable, to furnish medical assistance to individuals whose income and resources are insufficient to meet the costs of necessary medical services." *Beal v. Doe*, 432 U.S. 438, 444, 97 S. Ct. 2366, 2371 (1977) (citing 42 U.S.C. §§1396, 1396a(a)(10)). "A further objective is that policies governing eligibility be in the 'best interests' of the recipient." *Hodgson v. Board of County Commissioners, County of Hennepin*, 614 F.2d 601, 607 (8th Cir. 1980) (citing 42 U.S.C. §1396a(a)(19); 45 C.F.R. §206.10(a)(11)). The state must also provide safeguards to assure that its Medicaid plan will be administered "in a manner consistent with simplicity of administration." 42 U.S.C. §1396a(a)(19). On the other hand, the state must "provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan ... as may be necessary to safeguard against unnecessary utilization." 42 U.S.C. §1396a(a)(30)(A).

In addition, federal regulations require that each covered service be "sufficient in amount, duration, and scope to reasonably achieve its purpose," 42 C.F.R. §440.230(b) (1994), and mandate that states "may not arbitrarily deny or reduce the amount, duration, or scope of a required service ... to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition." 42 C.F.R. §440.230(c).

If, after a hearing, the Secretary finds that an approved state plan no longer complies with the provisions of the Medicaid Act, or that the state had failed to comply substantially with any applicable federal requirement, the Secretary may notify the state that federal financial participation will be withheld or limited. 42 U.S.C. §1396c.

In 1976, Congress passed what is commonly called the Hyde Amendment, which prohibits federal reimbursement for abortions except in the narrow circumstances that Congress deems to be medically necessary. Since 1976, Congress has added the Hyde Amendment to annual appropriations bills for the U.S. Department of Health and Human Services ("HHS"). While its provisions have varied to some degree from year to year, the effect of the Hyde Amendment has been to withdraw federal funding under Medicaid for most abortions.[1]

The Hyde Amendment for fiscal year 1994 permitted, for the first time since 1981, expenditure of federal funds for abortions when "the pregnancy is the result of an act of rape or incest" as well as when "necessary to save the life of the mother." Pub. L. No. 103-112, §509, 107 Stat. 1082, 1113 (1993). The full version of the 1994 Hyde Amendment provides:

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[1]The original Hyde Amendment, enacted in 1976, limited federal funding to abortions where "the life of the mother would be endangered if the fetus were carried to term." Pub. L. No. 94-439, §209, 90 Stat. 1418, 1434 (1976). The Hyde Amendment for the following fiscal year expanded the funding to include abortions for victims of rape and incest as well as "instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians." Pub. L. No. 95-205, §101, 91 Stat. 1460 (1977). From that year through 1981, the Hyde Amendment provided for reimbursement for abortions when a pregnancy resulted from rape or incest. The rape and incest provision was eliminated from the Hyde Amendment from 1982 until the appropriations bill for fiscal year 1994.

> None of the funds appropriated under this Act shall be expended for any abortion except when it is made known to the Federal entity or official to which funds are appropriated under this Act that such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest.

Id.[2]

This Court has previously held that the Medicaid statute, as modified by the Hyde Amendment, *requires* participating states to fund those abortions for which federal reimbursement is available. *Roe v. Casey*, 623 F.2d 829, 836-37 (3d Cir. 1980). *See also Hodgson*, 614 F.2d at 605; *Preterm, Inc. v. Dukakis*, 591 F.2d 121, 134 (1st Cir.), *cert. denied*, 441 U.S. 952, 99 S. Ct. 2182 (1979). We are bound by that precedent here. Accordingly, under Medicaid, funding for rape and incest abortions is mandatory for participating states.

The 1994 Hyde Amendment was reported out of committee with a provision requiring women seeking reimbursement for rape and incest abortions to report the crimes to the appropriate law enforcement officials. 139 Cong. Rec. H4304 (daily ed. June 30, 1993) (§207). However, a point of order was raised that the Hyde Amendment language violated parliamentary procedure of the House of Representatives, which prohibits attempts to "legislate" on an appropriations bill. The point of order was

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[2]The 1995 Hyde Amendment is identical in language to the 1994 version. Pub. L. No. 103-333, §509, 108 Stat. 2539, 2573 (1994).

conceded and the entire amendment stricken from the bill. 139 Cong. Rec. H4307-08.

The Secretary of HHS has delegated her authority to oversee and enforce the Medicaid program to the Health Care Financing Administration ("HCFA"). 49 Fed. Reg. 35,247, 35,249 (1984). HCFA has promulgated a regulation that provides:

> [Federal funding] is available in expenditures for an abortion when a physician has found, and certified in writing to the Medicaid agency, that on the basis of his professional judgment, the life of the mother would be endangered if the fetus were carried to term.

42 C.F.R. §441.203 (1994).

In addition, on December 28, 1993, HCFA issued a directive to state Medicaid directors, explaining:

> The purpose of this letter is to notify [state Medicaid directors] about a recent Congressionally enacted revision to the "Hyde Amendment" which affects the Medicaid program and to tell you how this revision in the law is to be implemented.
>
> ....
>
> As with all other mandatory medical services for which Federal funding is available, States are required to cover abortions that are medically necessary. By definition, abortions that are necessary to save the life of the mother are medically necessary. In addition, Congress this year added abortions for

pregnancies resulting from rape and incest to the category of medically necessary abortions for which funding is provided. Based on the language of this year's Hyde Amendment and on the history of Congressional debate about the circumstances of victims of rape and incest, we believe that this change in the text of the Hyde Amendment signifies Congressional intent that abortions of pregnancies resulting from rape or incest are medically necessary in light of both medical and psychological health factors. Therefore, abortions resulting from rape or incest should be considered to fall within the scope of services that are medically necessary.

The definition of rape and incest should be determined in accordance with each State's own law. *States may impose reasonable reporting or documentation requirements on recipients or providers, as may be necessary to assure themselves that an abortion was for the purpose of terminating a pregnancy caused by an act of rape or incest. States may not impose reporting or documentation requirements that deny or impede coverage for abortions where pregnancies result from rape or incest. To insure that reporting requirements do not prevent or impede coverage for covered abortions, any such reporting requirement must be waived and the procedure considered to be reimbursable if the treating physician certifies that in his or her professional opinion, the patient was unable,*

> *for physical or psychological reasons, to comply with the requirement.*
>
> ....
>
> By March 31, 1994, all States must ensure that their State Plans do not contain language that precludes [federal funding] for abortions that are performed to save the life of the mother or to terminate pregnancies resulting from rape or incest.

Letter, from Sally K. Richardson, Director, Medicaid Bureau, to All State Medicaid Directors (Dec. 28, 1993) (emphasis added), App. at 92-93.[3]

However, under the Pennsylvania Abortion Control Act, no federal or state funds can be provided for the termination of pregnancies caused by rape or incest unless the state agency: (1) obtains a statement from the physician

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[3]HCFA reaffirmed its position regarding the Hyde Amendment in another letter to state Medicaid Directors, which stated:

> HCFA will not establish a timeframe within which cases of rape or incest must be reported to a law enforcement or other agency. State law or policy should dictate when and to whom a rape or a case of incest must be reported. However, as noted in my December 28 letter, *the State-established reporting requirements may not serve as an additional coverage requirement to deny or impede payment for abortions where pregnancies result from rape or incent (sic).*
>
> *The State must establish procedures which permit the reporting requirements to be waived, and the procedure reimbursed, if the treating physician certifies that, in his or her professional opinion, the patient was unable, for physical or psychological reasons, to comply with the reporting requirements.*

Letter, from Sally K. Richardson, Director, Medicaid Bureau, to All State Medicaid Directors (Mar. 25, 1994) (emphasis added), App. at 116-17.

performing the abortion that the woman was a victim of rape or incest and that she *personally* reported the crime to the appropriate law enforcement agency together with the name of the offender; (2) obtains from the physician the woman's signed statement to that effect; and (3) verifies the reporting of the crime with the appropriate law-enforcement agency. 18 Pa. Cons. Stat. Ann. §3215(j) (Supp.1994).[4] The

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[4]Section 3215(j) of the Pennsylvania Abortion Control Act provides:

> No Commonwealth agency shall make any payment from Federal or State funds appropriated by the Commonwealth for the performance of any abortion pursuant to subsection (c)(2) or (3) unless the Commonwealth agency first:
>
> > (1) receives from the physician or facility seeking payment a statement signed by the physician performing the abortion stating that, prior to performing the abortion, he obtained a non-notarized, signed statement from the pregnant woman stating that she was a victim of rape or incest, as the case may be, and that she reported the crime, including the identity of the offender, if known, to a law enforcement agency having the requisite jurisdiction or, in the case of incest where a pregnant minor is the victim, to the county child protective service agency and stating the name of the law enforcement agency or child protective service agency to which the report was made and the date such report was made;
> >
> > (2) receives from the physician or facility seeking payment, the signed statement of the pregnant woman which is described in paragraph (1). The statement shall bear the notice that any false statements made therein are punishable by law and shall state that the pregnant woman is aware that false reports to law enforcement authorities are punishable by law; and
> >
> > (3) verifies with the law enforcement agency or child protective service agency named in the

Pennsylvania Abortion Control Act does not contain a waiver provision.

In addition, in cases where carrying the fetus to term would endanger the life of the mother, the Pennsylvania Act provides that no state or federal funds can be expended unless the danger is certified by a physician who is not the physician who will perform the abortion and who has no financial interest in the procedure. 18 Pa. Cons. Stat. Ann. §3215(c) (Supp.1994).[5]

> statement of the pregnant women whether a report of rape or incest was filed with the agency in accordance with the statement.
>
> The Commonwealth agency shall report any evidence of false statements, of false reports to law enforcement authorities or of fraud in the procurement or attempted procurement of any payment from Federal or State funds appropriated by the Commonwealth pursuant to this section to the district attorney of appropriate jurisdiction and, where appropriate, to the Attorney General.

18 Pa. Cons. Stat. Ann. §3215(j).

[5]Section 3215(c) of the Pennsylvania Abortion Control Act provides, in pertinent part:

> No Commonwealth funds and no Federal funds which are appropriated by the Commonwealth shall be expended by any State or local government agency for the performance of abortion, except:
>
> > (1) When abortion is necessary to avert the death of the mother on certification by a physician. When such physician will perform the abortion or has a pecuniary or proprietary interest in the abortion there shall be a separate certification from a physician who has no such interest.

The Providers commenced this challenge to sections 3215(c) and 3215(j) of the Pennsylvania Abortion Control Act, on their own behalf and on behalf of Medicaid-eligible rape and incest victims and Medicaid-eligible women whose lives are endangered but who cannot obtain second-physician certification. The Providers argued in the district court that the Commonwealth's reporting and certification requirements are inconsistent with the Hyde Amendment, and therefore invalid under the Supremacy Clause of the United Stated Constitution.[6]

The district court granted the Providers' motion for summary judgment on the Supremacy Clause claim. *Elizabeth Blackwell Health Center for Women v. Knoll*, No. 94-0169, slip op. at 5 (E.D.Pa. Sept. 15, 1994). Relying on our decision in *Roe v. Casey*, 623 F.2d 829 (3d Cir. 1980),

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> (2) When abortion is performed in the case of pregnancy caused by rape which, prior to the performance of the abortion, has been reported, together with the identity of the offender, if known, to a law enforcement agency having the requisite jurisdiction and has been personally reported by the victim.
>
> (3) When abortion is performed in the case of pregnancy caused by incest which, prior to the performance of the abortion, has been personally reported by the victim to a law enforcement agency having the requisite jurisdiction, or, in the case of a minor, to the county child protective service agency and the other party to the incestuous act has been named in such report.

18 Pa. Cons. Stat. Ann. §3215(c).

[6]The providers also challenged the second-physician certification provision as violative of Title XIX and the Due Process Clause of the Fourteenth Amendment. The district court did not address these additional claims.

the district court first acknowledged that Pennsylvania must cover all abortions for which federal reimbursement is provided under the Hyde Amendment. The court then reasoned:

> whereas the Hyde Amendment restricts abortion funding to cases of rape or incest, or where continuation of the pregnancy would endanger the life of the mother, the Pennsylvania statute imposes additional limitations. To the extent of these additional limitations, therefore, the Pennsylvania statute is invalid, under familiar pre-emption principles.

Id. at 3.

The district court also found support for its holding in the fact that "the same kinds of reporting and certification requirements set forth in the Pennsylvania statute had appeared in earlier versions of the Hyde Amendment. They were removed in the current version, and efforts by abortion opponents to include them were rejected by Congress." *Id.* at 4 (citation omitted). The district court thus concluded that the legislative history indicates congressional intent to eliminate the reporting requirements. *Id.* at 5. Further, the district court also held that the crime-fighting and other interests advanced by the Commonwealth to justify the challenged provisions were inconsistent with the purposes of the Medicaid Act and were therefore impermissible. *Id.* at 4.

The district court enjoined the Commonwealth from enforcing sections 3215(c) and 3215(j) of the Pennsylvania Abortion Control Act. This appeal followed. This Court granted the Commonwealth's motion to stay the order of the

district court pending appeal, and the Providers' request to expedite this appeal. We requested the Secretary of HHS to address as amicus the issue of the extent to which a state can require reporting and second-physician certification under the Medicaid Act and the Hyde Amendment in order for a woman to be entitled to an abortion.

II. REPORTING REQUIREMENTS FOR RAPE OR INCEST

The Secretary of HHS, who administers the Medicaid program, has interpreted the Medicaid statute as modified by the 1994 Hyde Amendment, to provide that, absent a waiver provision, reporting requirements for rape or incest abortions unduly impede or deter a woman's exercise of her right to the medically necessary procedure. Letter, (Dec. 28, 1993), App. at 93; Letter, (Mar. 25, 1994), App. at 117. The Secretary does not regard reporting requirements as *per se* invalid. *Id.* If this judgment is a reasonable exercise of the Secretary's discretion, it is entitled to due deference. Our inquiry is therefore focused upon whether the Secretary's interpretation warrants our deference.

A.

The Commonwealth disputes both the Secretary's and the district court's interpretations of the Hyde Amendment mandates regarding reporting requirements. The Commonwealth maintains that its requirements are valid and should be upheld in their entirety.

The Commonwealth acknowledges that under the Medicaid program, states are free to participate or not as they see fit, but if a state does elect to participate, it must comply with the conditions that Congress has set. The Commonwealth, however, citing *Pennhurst State School and*

Hospital v. Halderman, 451 U.S. 1, 17, 101 S. Ct. 1531, 1540 (1981), argues that in setting those conditions, "Congress [must] speak with a clear voice." It contends that a program like Medicaid:

> is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.... There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. [*Pennhurst*, 451 U.S. at 17, 101 S. Ct. 1540 (citation and footnote omitted).]

The Commonwealth maintains that on its face, the 1994 Hyde Amendment is a simple prohibition on the use of federal money for certain specified purposes. It sets neither requirements nor prohibitions on the states; it says nothing explicit about reporting or certification procedures. The Commonwealth concludes that the principles articulated in *Pennhurst*, when applied to this case, require that the district court's holding be reversed because it cannot reasonably be said that Congress has "unambiguously" forbidden reporting and certification requirements such as those contained in the Pennsylvania law.

The Commonwealth's reliance on *Pennhurst* is misplaced. *Pennhurst* involved the obligations of states under the federal Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§6000-6081 ("DDABRA"). In reversing our holding that the "bill of rights" provision of the DDABRA created enforceable rights and obligations, the

Supreme Court found no evidence that Congress intended to condition the grant of federal funds on the states' "assum[ing] the high cost of providing 'appropriate treatment' in the 'least restrictive environment' to their mentally retarded citizens." 451 U.S. at 18, 101 S. Ct. at 1540. The Court reasoned that because Congress failed to speak clearly regarding the state's obligations, it could not "fairly say that the State could make an informed choice" about participation in the joint program. *Id.* at 25, 101 S. Ct. at 1544.

Here, the Medicaid Act by its terms requires state Medicaid plans to cover all medically necessary services that fall within the mandatory areas of care. *See* 42 U.S.C. §1396a(a)(10)(A). Moreover, nearly fifteen years ago, we made clear in *Roe v. Casey*, that states participating in the Medicaid program must provide the abortion services that are enumerated in the Hyde Amendment. 623 F.2d at 836-37. The 1994 Hyde Amendment plainly puts participating states on notice of their obligations to fund abortions where necessary to save a woman's life or where the pregnancy is the result of rape or incest. Accordingly, the Commonwealth was given clear notice that, if it elected to continue to participate in the Medicaid program, it was obligated to provide funding for such abortions. Furthermore, any participating state should have realized that reporting requirements could be so onerous as to defeat Congress' intent that Medicaid funding be provided for the categories of abortions in question. Unlike the claims of the defendants in *Pennhurst*, the Commonwealth cannot reasonably claim that it was unaware of its obligations under the Medicaid Act, as modified by the Hyde Amendment and its implementing regulations. As such, the Secretary is reasonable in interpreting the Hyde Amendment to prohibit reporting requirements that operate as additional coverage requirements

to deny or impede some women from receiving the mandated abortion services.

The Commonwealth further maintains that other provisions of Title XIX authorize the challenged provisions. Participating states are required to adopt "reasonable standards ... for determining eligibility for and the extent of medical assistance." 42 U.S.C. §1396a(a)(17). States are likewise required to adopt "such safeguards as may be necessary to assure that eligibility for care and services under the plan will be determined, and such care and services will be provided, in a manner consistent with simplicity of administration and the best interests of the recipients." 42 U.S.C. §1396a(a)(19). Additionally, states must "provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan ... as may be necessary to safeguard against unnecessary utilization." 42 U.S.C. §1396a(a)(30)(A). Moreover, the current version of the Hyde Amendment requires states to "make known" to the Secretary that the abortion for which funding is sought is one in which the life of the mother is endangered or where the pregnancy resulted from rape or incest. The Commonwealth argues that Pennsylvania's reporting and certification procedures further these statutory mandates.

In her amicus brief, the Secretary acknowledges that Congress intended that states be allowed flexibility in developing procedures for administering their statutory obligations under the Medicaid statute and their state plans. Amicus Brief at 20 (citing *Schweiker v. Hogan*, 457 U.S. 569, 590-93, 102 S. Ct. 2597, 2610-11 (1982) (a state has the option to provide partial benefits to the medically needy); *Mississippi Hospital Ass'n, Inc. v. Heckler*, 701 F.2d 511, 515 (5th Cir.1983) (Congress intended states to be free to experiment with methods and standards of payment under

their Medicaid plans)). The Secretary's regulations have long recognized that states have discretion to impose reasonable coverage limits, consistent with the objectives of the Act, on the amount, duration, and scope of services, particularly with respect to ensuring "utilization control." 42 C.F.R. §440.230(b), (d). Indeed, the Secretary acknowledges that while states are not required to adopt reporting requirements, properly tailored reporting requirements can serve the purposes of the Medicaid Act and the Hyde Amendment.

However, in reconciling these eligibility requirements of the Medicaid statute with the language and history of the Hyde Amendment, and with the other purposes of the Medicaid program, the Secretary maintains that state-established reporting requirements "may not serve as an additional coverage requirement to deny or impede payment for abortions where pregnancies result from rape or ince[s]t." Letter, (Mar. 25, 1994), App. at 117. The Secretary has thus concluded that reasonable reporting requirements are valid only if they contain a waiver provision.

B.

The Providers argue that the district court correctly held that the Supremacy Clause requires the invalidation of Pennsylvania's reporting and second-physician certification requirements because they directly conflict with federal law. The Supremacy Clause requires invalidation of any state constitutional or statutory provision that conflicts with federal law, *see Reynolds v. Sims*, 377 U.S. 533, 584, 84 S. Ct. 1362, 1393 (1964), and compels compliance by participants in Title XIX federal aid programs with federal law and regulations. *King v. Smith*, 392 U.S. 309, 316-17, 88 S. Ct. 2128, 2133 (1968); *Roe v. Casey*, 623 F.2d at 837.

The Providers maintain that the district court properly relied on *Roe v. Casey* in holding that all state Medicaid programs must fund all abortions for which federal funds are available. In *Roe v. Casey*, we invalidated an earlier version of Pennsylvania's Medicaid funding restriction that proscribed coverage of abortions except when necessary to save the life of the pregnant woman. The then-applicable Hyde Amendment, like the 1994 Hyde Amendment, permitted the expenditure of funds for abortion where a pregnancy resulted from rape or incest, as well as in life-threatening circumstances. We reasoned:

> Title XIX, as now modified [by the current Hyde Amendment], requires the states to fund abortions in two categories: where the mother is endangered and where the pregnancy was the result of rape or incest. Pennsylvania ... would not fund the second category. Because Pennsylvania's statutes are not consistent with the modified Title XIX it is clear that, as written, they cannot stand.

Id. at 836-37.

The Providers argue that the district court correctly concluded that Pennsylvania's effort to restrict its Medicaid coverage of abortion to cases of *reported* rape and incest and *dually-certified* life endangerment runs directly contrary to *Roe v. Casey*'s mandate that Pennsylvania must fund *all* abortions for which federal funds are available. According to the Providers, the Pennsylvania reporting requirements would be invalid under *Roe v. Casey* even if they contained a waiver provision.

We agree that *Roe v. Casey* holds that the Hyde Amendment establishes a mandatory floor of required services, below which states may not fall. Under its ruling, *all* women who are eligible must receive the benefits that have been made available to them by Congress. The question with which we are faced today focuses on the issue of eligibility requirements that are utilized by states to determine whether a woman is entitled to the services enumerated in the Hyde Amendment. *Roe v. Casey* indicates that these eligibility requirements cannot be so onerous that they inhibit or deter women who are eligible to receive the abortion services from receiving them. *Roe v. Casey* does not, however, *per se* invalidate all reporting requirements used for eligibility purposes.

The Providers further argue that the legislative history provides a clear indication of congressional intent to prohibit the reporting and certification requirements contained in the Pennsylvania statute. The Providers note that in past versions of the Hyde Amendment, Congress had specifically included reporting requirements for rape and incest victims, and contained second-physician requirements for abortions in cases of severe and long-lasting physical health damage. *See* Pub. L. No. 96-536, §109, 94 Stat. 3166, 3170 (1980) (1981 Hyde Amendment) (providing funding for rape or incest victims "when such rape has been reported within seventy-two hours to a law enforcement agency or public health service"); Pub. L. No. 96-123, §109, 93 Stat. 923, 926 (1979) (1980 Hyde Amendment) (providing Medicaid funded abortions for rape or incest victims "when such rape or incest has been reported promptly to a law enforcement agency or public health service"); Pub. L. No. 95-480, §210, 92 Stat. 1567, 1586 (1978) (1979 Hyde Amendment) (restricting Medicaid funding in cases of severe and long-lasting health damage to those cases "so determined by two physicians"); Pub. L. No.

95-205, §101, 91 Stat. 1460 (1977) (1978 Hyde Amendment) (same). Additionally, in 1993, Congress considered but rejected a version of the 1994 Hyde Amendment that contained such a requirement. *See* 139 Cong. Rec. H4304 (daily ed. June 30, 1993) (showing previous version of amendment which included reporting requirement). The Providers contend that the district court properly inferred that, in repudiating previous versions of the Hyde Amendment, Congress clearly intended to eliminate provisions such as those at issue here.

The district court's reading of the legislative history goes too far. While Congress clearly no longer *requires* the states to implement reporting and certification procedures, it does not follow that states are now *forbidden* to have them. At most, the rejection of the earlier versions of the Hyde Amendment is a sign that Congress did not wish to mandate reporting requirements on the states. *Cf. John Hancock Mutual Life Ins. Co. v. Harris Trust & Sav. Bank*, ___ U.S. ___, 114 S. Ct. 517, 526 (1993) (courts are guided by the statute's words, not by discarded draft legislation). Moreover, we note that Congress' rejection of the reporting requirements for the 1994 Hyde Amendment was expressly based on procedural considerations. *See* 139 Cong. Rec. H4307-08. A rejection on procedural grounds provides no basis for any inference regarding Congress' views about the substantive provisions of the legislation. We are therefore left with no guidance from the legislative history.

C.

We are thus faced with competing interests within the Medicaid statute as amended by the 1994 Hyde Amendment. On one hand, the Pennsylvania reporting requirements that require a physician's averment setting forth that the woman

signed a statement that her pregnancy was the result of rape or incest can be defended on the ground that they further the state's interest under the Hyde Amendment in being able to "make known" to the Secretary that an abortion was performed upon a woman's representation that the pregnancy was the result of rape or incest. The requirement under Pennsylvania law that a woman report the rape or incest to law enforcement agencies can be defended as an attempt to ensure that the woman's representations are true as a part of the state's obligation to "safeguard against unnecessary utilization." 42 U.S.C. §1396a(a)(30)(A).

On the other hand, however, the Supreme Court has held that a state law that establishes benefit eligibility criteria for a federal program that are more restrictive than the criteria established by Congress is invalid. *King v. Smith*, 392 U.S. 309, 333, 88 S. Ct. 2128, 2141 (1968). Likewise, our decision in *Roe v. Casey* sets a mandatory floor of services that must be provided by the states under the Medicaid Act, as modified by the Hyde Amendment, which cannot be undermined by onerous reporting requirements. Furthermore, §1369a(a)(19) requires that the state provide safeguards to assure that the plan will be administered "in a manner consistent with simplicity of administration and the best interests of the recipients."[7]

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[7]The legislative history of this provision establishes that Congress added it to ensure that states would not impose bureaucratic and complicated mechanisms for determining eligibility that would deter recipients from obtaining care.

> This provision was included in order to provide some assurance that the States will not use unduly complicated methods of determining eligibility which have the effect of delaying in an unwarranted fashion the decision on eligibility for medical assistance or that the States will not administer the provisions for services in a way which adversely affects the availability or the quality of the care to be provided. The

It can reasonably be argued that the Pennsylvania reporting requirements are inconsistent with this mandate because they create a formidable barrier for some women who would otherwise be eligible to obtain abortions in cases of rape and incest. The Pennsylvania statute creates numerous hurdles for rape and incest victims: (1) a woman must *personally* report the incident of rape or incest to state law enforcement authorities, together with the name of the offender; (2) physicians are required to aver that they have obtained a signed statement from the pregnant woman verifying that she is pregnant as a result of rape or incest, that she complied with the reporting requirements, and that she is aware that false reporting is punishable by law; and (3) the Commonwealth must verify with a law enforcement agency or child protective service agency that the report was made. It can reasonably be argued that these requirements can be insurmountable for a victim of rape or incest who may be traumatized by the event. We are aware that rape is a vastly underreported crime, and it can be reasonably argued that reporting requirements such as Pennsylvania's can substantially deter some women from receiving services intended to be available to them under the statute.

The Secretary of HHS bears the responsibility of reconciling these competing interests in the statute. The

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> committee expects that under this provision, the States will be eliminating unrewarding and unproductive policies and methods of investigation and that they will develop such procedures as will assure that the most effective working relationships with medical facilities, practitioners, and suppliers of care and service in order to encourage their full cooperation and participation in the provision of services under the State plan.

S. Rep. No. 404, 89th Cong., 1st Sess. 76, *reprinted* in 1965 U.S.C.C.A.N. 1943, 2017.

Supreme Court has noted that "[p]erhaps appreciating the complexity of what it had wrought, Congress conferred on the Secretary exceptionally broad authority to prescribe standards for applying certain sections of the [Medicaid] Act." *Schweiker v. Gray Panthers*, 453 U.S. 34, 43, 101 S. Ct. 2633, 2640 (1981). The Secretary has concluded that these competing interests are best reconciled if state reporting requirements contain a waiver provision allowing a treating physician to certify that the woman was unable to comply with reporting requirements for physical or psychological reasons.

The Director of HCFA explained this point in her December 1993 directive to all state Medicaid directors:

> As with all other mandatory medical services for which Federal funding is available, States are required to cover abortions that are medically necessary.... States may impose reasonable reporting or documentation requirements on recipients or providers, as may be necessary to assure themselves that an abortion was for the purpose of terminating a pregnancy caused by an act of rape or incest. States may not impose reporting or documentation requirements that deny or impede coverage for abortions where pregnancies result from rape or incest. To insure that reporting requirements do not prevent or impede coverage for covered abortions, any such reporting requirement must be waived and the procedure considered to be reimbursable if the treating physician certifies that in his or her professional opinion, the patient was unable, for physical or

> psychological reasons, to comply with the requirement.

Letter, (Dec. 28, 1993), App. at 93. *See also* Letter, (Mar. 25, 1994), App. at 117 (reiterating the need for waiver provision in state-established reporting requirements).

Under the Secretary's interpretation, physicians may take into account both the immediate and long-term psychological consequences of reporting rape or incest to authorities that could leave a woman unable to fulfill those reporting requirements. A waiver thus ensures that reporting requirements do not prevent or impede coverage for covered abortions. Without Pennsylvania's assurance that it will waive the reporting requirements if the woman is physically or psychologically unable to comply, the Pennsylvania Abortion Control Act requirements comprise impermissible eligibility criteria.

The December 1993 HCFA directive constituted the Secretary's attempt to give interpretive guidance to the states in advance of their submission of state Medicaid plans.[8] The HCFA directive is an interpretation of the Hyde Amendment mandates as reconciled with the competing interests within the Medicaid statute. Since the directive clarifies and explains existing law, we deem it "interpretive." *See Bailey v. Sullivan*, 885 F.2d 52, 62 (3d Cir.1989) ("If the rule in question merely clarifies or explains existing law or

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[8]We are aware of the related action, *Ridge v. Shalala*, No. 94-7751, which is currently pending in this Court, in which the Commonwealth is challenging HHS's "waiver" requirement as violative of the Administrative Procedures Act. The district court dismissed the action on jurisdictional grounds because the Secretary has not yet called for a hearing nor issued a decision about the conformity of Pennsylvania's plan with the Hyde Amendment. *Casey v. Shalala*, No. 94-390 (M.D.Pa. Nov. 28, 1994).

regulations, it will be deemed interpretive."); *American Min. Congress v. MSHA*, 995 F.2d 1106, 1112 (D.C. Cir. 1993) (setting out factors to distinguish between legislative and interpretive rules). As an interpretive rule, the Secretary's pronouncements are exempted from the APA notice-and-comment requirements. 5 U.S.C. §553(b)(A) (notice requirement does not apply "to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice"). This Court and the Supreme Court have upheld the validity of interpretive rules. *Bailey* 885 F.2d at 62; *Shalala v. Guernsey Memorial Hospital*, ___ U.S. ___, 115 S. Ct. 1232, 1237 (1995).

Courts have long recognized that "considerable weight" must be conferred to an executive department's construction of a statutory scheme which it is entrusted to administer. The Supreme Court has announced that the principle of deference to administrative interpretation:

> has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.... If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 844-45, 104 S. Ct. 2778, 2782-83 (1984) (citations omitted). Such deference is appropriate here even though the Secretary's interpretation is not contained in a "legislative rule." *See, e.g., Health Insurance Ass'n of America v. Shalala*, 23 F.3d 412, 424 (D.C. Cir. 1994); *Hicks v. Cantrell*, 803 F.2d 789, 791-92 (4th Cir. 1986). Indeed, the Supreme Court recently reversed our decision in *Reno v. Koray*, 21 F.3d 558, 562-65 (3d Cir.1994), where we had declined to defer to the Bureau of Prisons' interpretation of 18 U.S.C. §3585(b). The Supreme Court explained:

> The Bureau, as the agency charged with administering the credit statute ... has interpreted §3585(b)'s "official detention" language to require credit for time spent by a defendant under a §3142(e) "detention order".... As we have explained, ... the Bureau's interpretation is the most natural and reasonable reading of §3585(b)'s "official detention" language. It is true that the Bureau's interpretation appears only in a "Program Statement"--an internal agency guideline--rather than in "published regulations subject to the rigors of the Administrative Procedur[e] Act, including public notice and comment." 21 F.3d at 562. But BOP's internal agency guideline, which is akin to an "interpretive rule" that "do[es] not require notice-and-comment," *Shalala v. Guernsey Memorial Hospital*, 514 U.S. ___, ___(1995) (slip op., at 11), is still entitled to some deference, cf., *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 157 (1991), since it is a "permissible

> construction of the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467, U.S. 837, 843 (1984).

Reno v. Koray, No. 94-790, 1995 WL 328305, at *7 (U.S. June 5, 1995) (footnote omitted).

The Secretary's reconciliation of the competing interests in the Medicaid statute and Hyde Amendment is reasonable. Because the Secretary's consistent and contemporaneously expressed construction of the Medicaid statute as amended by the Hyde Amendment is a reasonable one, it is accorded considerable weight under principles announced in *Chevron*.

Accordingly, we will defer to the Secretary's interpretation of the Hyde Amendment, and hold that because the Pennsylvania reporting requirements lack a waiver procedure and therefore may deprive eligible women of the benefits which Congress has made available to them, they are to this extent in conflict with federal law and are invalid. *See Louisiana Public Service Comm'n. v. F.C.C.*, 476 U.S. 355, 368-69, 106 S. Ct. 1890, 1898-99 (1986) (under the Supremacy Clause, a federal agency acting within the scope of its congressionally delegated authority has the power to preempt state regulation and render unenforceable state laws). Thus, until Pennsylvania, pursuant to state law, adopts a waiver provision in accordance with the Secretary's directive, the Commonwealth is enjoined from enforcing its rape and incest reporting requirements.

III. SECOND PHYSICIAN CERTIFICATION REQUIREMENTS

Like reporting requirements for abortions where pregnancies result from rape or incest, certification requirements for abortions necessary to save the life of the mother are not expressly addressed in the Hyde Amendment. However, pursuant to the broad authority to promulgate regulations in administering the Medicaid program, *see, e.g., Schweiker*, 453 U.S. at 43, 101 S. Ct. at 2640, the Secretary, shortly after the passage of the first Hyde Amendment in 1977, promulgated a regulation concerning abortions where the mother's life was endangered. The regulation provides:

> [Federal funding] is available in expenditures for an abortion when a *physician* has found, and certified in writing to the Medicaid agency, that on the basis of his professional judgment, the life of the mother would be endangered if the fetus were carried to term.

42 C.F.R. §441.203 (emphasis added). This regulation has not been altered in substance since its initial promulgation.

The Secretary construes this regulation to provide if *any* physician--including a woman's attending physician--certifies that the life of the mother would be endangered, federal funding is "available." Consistent with our holding in *Roe v. Casey* that states are required by the Medicaid Act to fund all abortion services that are allowed under the Hyde Amendment, the Secretary concludes that a state regulation that attempts, in effect, to require a second physician's certification in addition to a certification given by "a physician" is inconsistent with the regulation.

We must give substantial deference to an agency's construction of its own regulation. *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 150-51, 111 S. Ct. 1171, 1175-76 (1991); *Lyng v. Payne*, 476 U.S. 926, 939, 106 S. Ct. 2333, 2341 (1986). As the Supreme Court recently announced, courts "must defer to the Secretary's interpretation unless an 'alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation.'" *Thomas Jefferson University v. Shalala*, ___ U.S. ___, 114 S. Ct. 2381, 2386-87 (1994) (quoting *Gardebring v. Jenkins*, 458 U.S. 415, 430, 108 S. Ct. 1306, 1314 (1988)).[9]

We believe that the Secretary's construction comports with the plain language of the regulation. The phrase "[Federal funding] is available ... for an abortion when *a physician* has found and certified [that the mother's life is endangered]" does not limit the class of physicians who have the authority to certify. We believe that this reading of the regulation gives the phrase "a physician" its ordinary and natural meaning. *See F.D.I.C. v. Meyer*, ___ U.S. ___, 114

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[9]In *Gardebring*, the Supreme Court, while recognizing that the Secretary had not taken a position until that litigation, held that:

> when it is the Secretary's regulation that we are construing, and when there is no claim in this Court that the regulation violates any constitutional or statutory mandate, we are properly hesitant to substitute an alternative reading for the Secretary's unless that alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation.

458 U.S. at 430, 108 S. Ct. at 1314. Thus, we will defer to the Secretary's construction of her own regulation even if the interpretation is put forth in litigation.

S. Ct. 996, 1001 (1994) ("[W]e construe a statutory term in accordance with its ordinary or natural meaning.").

Further, the history of the physician certification regulation indicates that the Secretary intended this construction at the time of the regulation's promulgation. The 1976 Hyde Amendment provided for federal funding "where the life of the mother would be endangered if the fetus were carried to term." Pub. L. No. 94-439, §209, 90 Stat. 1418, 1434 (1976). The 1976 Hyde Amendment did not require a physician's certification. The Secretary issued a notice of proposed rule-making which stated that:

> the Department will provide Federal financial participation in the cost of abortions only where *the attending physician*, on the basis of his or her professional judgment, has certified that the abortion is necessary because the life of the mother would be endangered if the fetus were carried to term.

42 Fed. Reg. 40486 (1977) (emphasis added). The Secretary construed this notice as meaning that "in the absence of fraud, the physician's judgment would be conclusive." 43 Fed. Reg. 4574 (1978).

In enacting the 1977 Hyde Amendment, Congress retained the 1976 Hyde Amendment language concerning funding for abortions when the mother's life is endangered. Pub. L. No. 95-205, §101, 91 Stat. 1460 (1977). The Secretary concluded that the failure of Congress to question the manner in which the Secretary had previously implemented the exception, and its reenactment without change, should be understood as congressional approval of the Secretary's interpretation. 43 Fed. Reg. 4574. Thus,

notwithstanding Congress' silence, the Secretary's 1977 implementing regulations construed the intent of Congress to be that certification of life endangerment by a physician should be required. 43 Fed. Reg. 4570 (§50.304). Accordingly, the Secretary's construction of her regulation, 42 C.F.R. §441.203, as providing for federal funding when "any physician"--including a woman's attending physician--certifies that the life of the mother would be endangered, is consistent with the history of the regulation.

The Secretary's construction is also consistent with other requirements of Title XIX and its implementing regulations. Section 1396a(a)(17) mandates that states establish eligibility requirements that are "consistent with the objectives" of Title XIX. 42 U.S.C. §1396a(a)(17). In *Beal v. Doe*, the Supreme Court explained that "Title XIX's broadly stated primary objective [is] to enable each state, as far as practicable, to furnish medical assistance to individuals whose income and resources are insufficient to meet the costs of necessary medical services." *Beal v. Doe*, 432 U.S. 438, 444, 97 S. Ct. 2366, 2371 (1977) (citing 42 U.S.C. §§1396, 1396a(a)(10)). A further objective is to assure that state Medicaid plans are administered "in a manner consistent with simplicity of administration and the best interest of the recipients." 42 U.S.C. §1396a(a)(19); *Hodgson*, 614 F.2d at 607. The Secretary's construction of the implementing regulation for the endangerment certification provision could be said to further these objectives. In 1977, in promulgating 42 C.F.R. §441.203, the Secretary noted:

> The purpose of the certification requirement is not to enable the Department to question physician judgment, but rather to ensure that physician judgment has in fact been exercised. This is the most efficient manner by which a

> State agency or a program or project--or the Department in conducting audits or other enforcement reviews--may ascertain that the statutory requirements for a claim for Federal financial participation in an abortion have been met.

43 Fed. Reg. 4574. Thus, we will defer to the Secretary's interpretation of her regulation that the sufficient condition triggering eligibility for a Medicaid funded abortion is certification by *any physician* that a woman's life would be endangered by carrying the fetus to term.

In contrast to the Secretary's construction of the federal certification regulation, Pennsylvania's certification requirements narrow the Secretary's criteria. The pertinent part of §3215(c) of the Pennsylvania Abortion Control Act provides that no state or federal funds will be expended for an abortion, except:

> When abortion is necessary to avert the death of the mother on certification by a physician. *When such physician will perform the abortion or has a pecuniary or proprietary interest in the abortion there shall be a separate certification from a physician who has no such interest.*

18 Pa. Cons. Stat. Ann. §3215(c)(1) (emphasis added). Under the Commonwealth's Medicaid scheme, even if the attending physician who is to provide the abortion certifies that the procedure is necessary because of life endangerment, there must be yet another certification. In effect, the Commonwealth's regulation renders the certification of an attending physician irrelevant. This reading is contrary to the

Secretary's regulation, which provides that federal funding is available under such circumstances.

Accordingly, because the Pennsylvania second-physician certification requirement for abortions necessary to save the life of the mother conflicts with a Medicaid implementing regulation as construed by the Secretary, this requirement is invalid.

CONCLUSION

We hold that the Secretary's construction of the Hyde Amendment is reasonable and requires due deference. Under the Secretary's interpretation, both §3215(c) and §3215(j) of the Pennsylvania Abortion Control Act are invalid insofar as they (1) fail to allow for a waiver of the rape and incest reporting requirements in accordance with the HCFA directives and (2) require certification by a second physician in cases where the life of the mother is endangered. Accordingly, we will affirm the order of the district court to the extent that it enjoins the Commonwealth from (1) requiring certification by a second physician, and (2) enforcing its rape and incest reporting requirements until it adopts, pursuant to state law, a waiver in accordance with the HCFA directive. In all other respects, these provisions remain enforceable. We will remand for the entry of an order tailored in accordance with this decision.

NYGAARD, Circuit Judge, dissenting.

Today, the majority holds that, by the simple expedient of writing a letter, a sub-cabinet-level federal bureaucrat can preempt the statutory enactment of an elected state legislature. It bases its holding on the principle of deference set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984), and later cases. Because I believe that what the Secretary would have us give her is not deference due, but rather deference run amok, I reach a different result than the majority, and must dissent.[1]

I.

A.

Federal courts are commanded by *Chevron* and a host of other cases to give deference to certain legal conclusions of administrative agencies. But deference "cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *BATF v. FLRA*, 464 U.S. 89, 97, 104 S. Ct. 439, 444 (1983); *accord EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, ____, 111 S. Ct. 1227, 1237 (1991) (Scalia, J., concurring) ("deference is not abdication"); *St. Luke's Hosp. v. Secretary of Health & Human Servs.*, 810 F.2d 325, 332 (1st Cir. 1987). (quoting *BATF*). It is therefore vital that we carefully consider each case to determine whether deference

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[1]My reasons for doing so are, regrettably for the readers who must digest them whole, somewhat lengthy and involved. As Justice Scalia once said, "Administrative law is not for sissies--so you should lean back, clutch the sides of your chairs, and steel yourselves...." Hon. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 511.

is warranted, and if so, how much to accord. Anything less has the potential to be judicial abdication rather than judicial review. *See Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 914-16 (3d Cir.1981); *West v. Bowen*, 879 F.2d 1122, 1134 (3d Cir.1989) (Mansmann, J., concurring and dissenting); Hon. Joseph W. Weis, Jr., *A Judicial Perspective On Deference to Administrative Agencies: Some Grenades From the Trenches*, 2 Admin. L.J. 301, 307 (1988).

B.

The full language of the Hyde Amendment provides as follows:

> None of the funds appropriated under this Act shall be expended for any abortion except when it is made known to the Federal entity or official to which funds are appropriated under this Act that such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest.

Pub. L. No. 103-112, §509, 107 Stat. 1082, 1113 (1993). As written, the statutory language neither requires nor forbids state reporting requirements in cases of rape or incest, and the majority quite correctly rejects the position of the providers and the district court that such requirements are per se in conflict with the Hyde Amendment (majority typescript at 15-18). The majority then goes on to hold that we must defer under *Chevron* to the interpretation of the Director of the Medicaid Bureau that reporting and certification requirements are invalid in the absence of a waiver provision. *Id.* at 24-31. I believe this to be incorrect.

C.

In *Chevron*, the Environmental Protection Agency promulgated a legislative rule to define the statutory term "stationary source" as an entire manufacturing plant. The Clean Air Act, while requiring permits for new or modified stationary sources, gave no indication of how such a source should be defined. In approaching the standard for judicial review of the agency's choice, the Supreme Court employed a bifurcated analysis:

> First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 842-43, 104 S. Ct. at 2781-82 (footnotes omitted).

To recapitulate, "the appropriate level of deference due an agency's construction of a statute that it administers depends on the clarity of the statute." *Pennsylvania v. United States Dep't of Health & Human Servs.*, 928 F.2d 1378,

1383-84 (3d Cir. 1991). In *Chevron* step one, we examine the statutory language to determine whether Congress has directly spoken to the issue; if it has, we do not even proceed to step two. *Pennsylvania Medical Soc'y v. Snider*, 29 F.3d 886, 902 (3d Cir. 1994). Only if Congress has not spoken, may we apply step two of the *Chevron* analysis. And then we are limited to reviewing whether the agency's construction of the statute is "permissible." Before a reviewing court can even reach step two, however, it must find that Congress explicitly or implicitly delegated to the agency the authority to construe the statutory provision at issue. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649, 110 S. Ct. 1384, 1390 (1990) ("[A] precondition to deference under *Chevron* is a congressional delegation of administrative authority."). I simply do not believe there was a delegation here. *See infra* Part IV.

II.

A.

The majority, relying on *Bailey v. Sullivan*, 885 F.2d 52, 62 (3d Cir. 1989) and *American Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993), concludes that the letters constitute validly promulgated interpretive rules rather than legislative rules (typescript at 22).[2] I agree reluctantly that, under binding

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[2]This conclusion is vital to the majority's holding. Under the Administrative Procedure Act, rules may be either legislative or nonlegislative. A legislative rule must be promulgated according to the notice and comment procedures of 5 U.S.C. § 553, which the Secretary did not do in this case. *See, e.g., Beazer E., Inc. v. United States Envtl. Protection Agency*, 963 F.2d 603, 606 (3d Cir. 1992); *Texaco, Inc. v. Federal Power Comm'n*, 412 F.2d 740, 742 (3d Cir. 1969). Indeed, a legislative rule which is not promulgated in accordance with the requirements of the APA is not entitled to have the force of law. *See, e.g.,*

circuit precedent, the letters must be treated as interpretive rules. Were I unfettered by precedent, however, I would conclude that the letters are "spurious rules," entitled to no weight whatsoever, as I shall explain shortly.

In *Bailey*, we opined that "[i]f the rule in question merely clarifies or explains existing law or regulations, it will be deemed interpretive." 885 F.2d at 62. The majority seems to imply that, because the two letters clarify and explain the already-existing Medicaid Act and Hyde Amendment, they are interpretive. But this reasoning proves too much. Indeed, it is difficult to conceive of *any* nonprocedural regulation that does not in some way explain or clarify an existing federal statute.

The reported decisions have been nearly unanimous in adopting a more restricted definition of what type rule merely clarifies or explains existing law. If the position the agency takes in its rule flows directly from the statutory language itself, i.e., the court would reach the same construction of the statute even in the absence of the regulation, the rule is interpretive. On the other hand, if the rule exercises a congressional delegation of power to make binding rules that create rights, assign duties or impose obligations, it is legislative. This distinction was aptly explained in *Dia Navigation Co. v. Pomeroy*, 34 F.3d 1255 (3d Cir. 1994), where we stated, relying in part on *FLRA v. Dep't of the Navy*, 966 F.2d 747, 762 n.14 (3d Cir. 1992) (in banc):

> The critical difference between legislative and interpretive rules is that the former have the force and effect of law while the latter do not.

Chrysler Corp. v. Brown, 441 U.S. 281, 302-03, 99 S. Ct. 1705, 1718 (1979).

> Stated differently, legislative rules have substantive legal effect, while interpretive rules typically involve construction or clarification of a statute or regulation. If a rule creates rights, assigns duties, or imposes obligations, the basic tenor of which is not already outlined in the law itself, then it is substantive [legislative]. Put yet another way, "what distinguishes interpretive from legislative rules is the legal base upon which the rule rests. If the rule is based on specific statutory provisions, and its validity stands or falls on the correctness of the agency's interpretation of those provisions, it is an interpretive rule. If, however, the rule is based on an agency's power to exercise its judgment as to how best to implement a general statutory mandate, the rule is likely a legislative one." *United Technologies Corp. v. EPA*, 821 F.2d 714, 719- 20 (D.C. Cir. 1987).

34 F.3d at 1264 (some citations and internal quotation marks omitted).[3] Thus, to the extent the majority purports to hold that any rule that explains or clarifies an existing statute or regulation is interpretive notwithstanding the fact that the

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[3] *Accord Shalala v. Guernsey Mem. Hosp.*, ___ U.S. ____, ____, 115 S. Ct. 1232, 1239 (1995) (a rule that effects a change in the law is legislative and must comply with APA rulemaking requirements); *Beazer E.*, 963 F.2d at 606 (interpretive rule only reminds parties of existing duties); *Texaco*, 412 F.2d at 744 (general statements of policy impose no rights or obligations). This distinction is equally true in the case of federal-state cooperative programs, such as Medicaid. *See Ohio Dep't of Human Servs. v. United States Dep't of Health & Human Servs.*, 862 F.2d 1228, 1229-30 (6th Cir. 1988) (HCFA Medicaid rule not interpretive); *Cabais v. Egger*, 690 F.2d 234, 238-289 (D.C. Cir. 1982) (federal regulation of state-administered program not interpretive).

duties imposed thereby do not flow directly from the statutory language, its holding contravenes earlier decisions of this court, in violation of Third Circuit Internal Operating Procedure 9.1.

American Mining is nothing more than a refinement of the law discussed above; that is to say, for a rule to be legislative and have the force of law, Congress must have delegated legislative power to the agency and the agency must have intended to exercise that power in promulgating its rule. 995 F.2d at 1109. Under this test, to determine whether a rule is legislative or interpretive, a reviewing court uses four factors, any one of which indicates that the rule is legislative. The first, whether in the absence of the rule the agency could not succeed in an enforcement action, *id.* at 1112, simply restates the law discussed above. The others, which include whether the agency has published its rule in the Code of Federal Regulations; whether the agency has explicitly invoked its legislative authority; or whether the rule amends a prior legislative rule, *id.*, are additional factors indicating that a rule is legislative.

B.

Under the *American Mining* test, the two letters at issue here are distinctly *legislative* in character. Looking only at the plain language of the statute, there is simply no way that the Hyde Amendment itself can be construed to require or forbid reporting and certification requirements, with or without a waiver provision. Even the majority recognizes as much, because it relies entirely on *Chevron* deference to reach its holding that Pennsylvania law is preempted. *See* majority typescript at 15-24. In the absence of the two letters, there would be no plausible argument that Pennsylvania's reporting and certification requirements are invalid. Accordingly, the

letters fail the *American Mining* and *Dia Navigation* tests; they are not interpretive rules.

Because the Secretary failed to follow the §553 notice and comment procedure, however, her two letters, while legislative in character, have no force of law whatsoever. *See Chrysler Corp. v. Brown*, 441 U.S. at 302-03, 99 S. Ct. at 1718; *Alaska v. United States Dep't of Transp.*, 868 F.2d 441, 445 (D.C. Cir. 1989); Charles H. Koch, Jr. & Ronald F. Wright, Jr., *Administrative Law and Practice* §3.13, at 49 (Supp. 1995). Indeed, as Professor Anthony points out, they are not true legislative rules at all, but rather examples of invalid "spurious rules;" that is, rules that go beyond mere interpretation of existing law and purport to have binding effect, yet were not submitted to notice and comment rulemaking. Robert A. Anthony, *"Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: Lifting the Smog*, 8 Admin. L.J. 1, 9-10, 14 (1994). Discussing *American Mining*, Professor Anthony argues that any rule meeting any of *American Mining's* four criteria without being subjected to notice and comment is a spurious rule and has no validity. *Id.* at 15-22. I agree.

Nevertheless, precedent constrains us to treat these two letters as interpretive rules. In *Daughters of Miriam Ctr. v. Mathews*, 590 F.2d 1250, 1255-56 & n.9 (3d Cir. 1978), we stated that, because the agency's rules were not promulgated in accordance with §553 of the Administrative Procedure Act, 5 U.S.C. §553, "they perforce must be considered interpretive rules." We also relied on the agency's characterization of the rules as interpretive. *Id.* Two years later, we followed the *Mathews* approach, "tak[ing] the agency at its word" that its rule was interpretive. *Cerro Metal Prods. v. Marshall*, 620

F.2d 964, 981-82 (3d Cir. 1980).[4] Thus, and although I strenuously disagree with the result, under Third Circuit Internal Operating Procedure 9.1 we must treat the agency's two letters as interpretive rules, despite their spurious character. *See United States v. Monaco*, 23 F.3d 793, 803 (3d Cir. 1994).[5]

C.

The fact that we are required to treat the two letters as interpretive rules does not excuse the agency from its failure to follow the notice and comment rulemaking procedure, however. Where, as here, a regulatory agency intends to bind the public or the states, it is incumbent upon it to promulgate a valid legislative rule. As we said in *Dia Navigation*, the purpose of the §553 notice and comment procedure is to insure public participation by and fairness to affected parties when lawmaking authority has been delegated to unelected, unrepresentative regulatory agencies. 34 F.3d at 1255

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[4]*See also Ohio*, 862 F.2d at 1234-35 (HCFA Medicaid rule was legislative in character but was treated for deference purposes as interpretive).

[5]There is some evidence that the law of the circuit has evolved over the fifteen years since *Cerro* and *Mathews*. In *Limerick Ecology Action, Inc. v. United States Nuclear Regulatory Comm'n*, 869 F.2d 719 (3d Cir. 1989), we stated that:

> The agency's label of an agency action, although one factor to be considered, does not control whether the action is in fact a [legislative] rulemaking. Instead, it is the substance of what the agency has purported to do and has done which is decisive.

Id. at 734 (citation to *Cerro* and other cases omitted). It is apparent from this language that the *Limerick* court, like the courts in *Dia Navigation* and *American Mining*, took a functional approach to distinguishing legislative from interpretive rules. Nevertheless, there is no evidence in any of our cases, including FLRA (which was heard in banc), that the *Cerro-Mathews* approach has been overruled.

(quoting *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980)). It "avoid[s] the inherently arbitrary nature of unpublished determinations." *Morton v. Ruiz*, 415 U.S. 199, 232, 94 S. Ct. 1055, 1073 (1974). Notice and comment also serves the salutary purpose of forcing the agency to educate itself on the facts, issues and policy options available before issuing binding regulations. *FLRA*, 966 F.2d at 763 (quoting *Texaco*, 412 F.2d at 744); *Batterton*, 648 F.2d at 703-04 (same); *accord Marshall v. Western Union Tel. Co.*, 621 F.2d 1246, 1254 (3d Cir. 1980); Robert A. Anthony, *"Well, You Want the Permit, Don't You?" Agency Efforts to Make Nonlegislative Documents Bind the Public*, 44 Admin L. Rev. 31, 32 (1992) [hereinafter Anthony, *Agency Efforts*]. I can say it no better than Professor Anthony, who states:

> Values served by the legislative rulemaking process are large ones. Fairness is furthered by giving notice to those who are to be bound, both when the proposed rule is about to be considered and when the final rule is definitively published. The accuracy and thoroughness of an agency's actions are enhanced by the requirement that it invite and consider the comments of all the world, including those of directly affected persons who are able, often uniquely, to supply pertinent information and analysis. The acceptability and therefore the effectiveness of a final rule are elevated by the openness of the procedures through which it has been deliberated and by the public's sense of useful participation in a process that affects them. Its legitimacy rests upon all of these considerations, as well as upon the foundational fact that the agency has observed

> the procedures laid down by Congress for establishing rules with the binding force of law. The agency's accountability for its rules is deepened by the court-made requirement of a reasoned explanation based upon a substantial rulemaking record.
>
> Beyond all of this, the APA rulemaking requirements impose a salutary discipline. That discipline deters casual and sloppy action, and thereby forestalls the confusion and needless litigation that can result from such action. And that discipline reduces tendencies toward over-regulation or bureaucratic overreaching, and discourages low-profile attempts to create practically-binding norms that Congress or the Administration would not have approved.

Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like-Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311, 1373-74 (1992), *also published* as Administrative Conference of the United States, *Recommendations and Reports, Report for Recommendation 92-2*, 1992 ACUS 71, 136-37.[6]

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[6]The Administrative Conference of the United States adopted Professor Anthony's recommendation. 1992 ACUS 5, 41 Duke L.J. at 1384; *see* 1 C.F.R. 305.92-2. Recommendation 92-2 provides that "[a]gencies should not issue statements of general applicability that are intended to impose binding substantive standards or obligations upon affected persons without using legislative rulemaking procedures (normally including notice-and-comment)."

In *State of New Jersey v. Department of Health & Human Servs.*, 670 F.2d 1262, 1281 (3d Cir.1981), we explained:

> The APA notice and comment procedures exist for good reason: to ensure that unelected administrators, who are not directly accountable to the populace, are forced to justify their quasi-legislative rulemaking before an informed and skeptical public. When these procedures are not followed in situations where they are in fact applicable, a court promotes neither the agency's ultimate mission nor respect for the law by ignoring the agency's indiscretion or condoning the agency's shortcut.

There is indeed a great danger in giving *Chevron* deference (and often, legislative effect) to rules promulgated without the benefit of notice and comment rulemaking. First of all, it encourages agencies to flout the Administrative Procedure Act and issue binding regulations in informal formats. *See Community Nutrition Inst. v. Young*, 818 F.2d 943, 953 (D.C. Cir. 1987) (Starr, J., concurring and dissenting) (agencies may yield to temptation and issue rules with legislative effect in interpretive formats to avoid scrutiny). After all, once a reviewing court defers to the agency and upholds a rule, as the majority does here, it becomes law without the bother of the agency taking true legislative action. Worse, it results in private parties (and, in this case, the Commonwealth of Pennsylvania) being bound by "a proposition they had no opportunity to shape and will have no meaningful opportunity to challenge when it is applied to them." *National Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 240 (D.C. Cir. 1992) (citing Anthony, *Agency Efforts*,

supra, at 38; quoting Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts*, 7 Yale J. on Reg. 1, 58 (1990)); *see also* 1 Kenneth C. Davis & Richard J. Pierce, *Administrative Law Treatise* §3.5, at 119-20 (1994) (*Chevron* deference inappropriate for nonlegislative rules). I find such a result both politically undemocratic and jurisprudentially odious.

III.

The majority, while treating the two letters as interpretive rules, nevertheless gives them full deference under *Chevron*, a case that arose in the context of a legislative rule and quite different jurisprudential concerns. I believe that this, too, is incorrect.

A.

Before *Chevron*, the amount of consideration to be given interpretive rules was well-settled. The classic statement from the Supreme Court was given in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 164 (1944):

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those

> factors which give it power to persuade, if lacking power to control.

This approach was reaffirmed three decades later in *General Elec. Co v. Gilbert*, 429 U.S. 125, 141-42, 97 S. Ct. 401, 411 (1976), where the Court analyzed an EEOC guideline as an interpretive rule under the *Skidmore* doctrine.[7]

Chevron, of course, was a watershed decision in the area of judicial deference to regulatory agencies. Significantly, however, *Chevron* involved a properly promulgated *legislative* rule. That case simply did not deal with the level of consideration a court should give to an interpretive rule, and did not overrule *Skidmore*.

Indeed, in the years following *Chevron*, the Supreme Court has reaffirmed that *Skidmore* consideration is the appropriate standard of review for interpretive rules. In *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, ____, 111 S. Ct. 1171, 1179 (1991), the Court, citing *Skidmore*, opined that interpretive rules are *not* "entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers[.]" And in *EEOC*, the Supreme Court again relied upon *Skidmore* and *Gilbert*, not *Chevron*, to determine how much weight to give an interpretive rule. 499 U.S. at ____, 111 S. Ct. at 1235;[8]

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[7] *Accord Batterton v. Francis*, 432 U.S. 416, 424 & n.9, 97 S. Ct. 2399, 2405-06 & n.9 (1977); *Morton*, 415 U.S. at 237, 94 S. Ct. at 1075; *State of New Jersey*, 670 F.2d at 1282; *Cerro*, 620 F.2d at 980-82; *Baker v. Otis Elevator Co.*, 609 F.2d 686, 692 (3d Cir.1979); *Mathews*, 590 F.2d at 1258.

[8] Justice Scalia concurred, opining that the interpretive rule was entitled to *Chevron* deference and that *Gilbert* was "an anachronism [.]" *Id.* at ____, 111 S. Ct. at 1236. It is thus clear that the majority held that *Chevron* was not applicable.

accord Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 463 n. 12, 109 S. Ct. 2558, 2571-72 n.12 (1989) (interpretive rule entitled to less weight, relying on *Gilbert*). It is therefore manifest that *Skidmore* and *Gilbert* survived *Chevron*.

Recently, in dicta, four panels have questioned whether *Skidmore* or *Gilbert* were overruled by *Chevron*. *See E.I. duPont de Nemours & Co. v. Commissioner*, 41 F.3d 130, 135-36 n.23 (3d Cir.1994); *Sekula v. Federal Deposit Ins. Corp.*, 39 F.3d 448, 453-54 n.13 (3d Cir. 1994); *Reich v. Local 30, Int'l Bhd. of Teamsters*, 6 F.3d 978, 987 n.14 (3d Cir. 1993); *International Raw Materials, Ltd. v. Stauffer Chemical Co.*, 978 F.2d 1318, 1325 n.9 (3d Cir. 1992), *cert. denied*, ___ U.S. ____, 113 S. Ct. 1588 (1993). None of these opinions discussed the effect of *Martin* or *EEOC*.

In fact, in several cases decided after *Chevron*, we have not given *Chevron*-style deference to interpretive rules. In *Armstead v. United States Dep't of Housing & Urban Dev.*, 815 F.2d 278, 282 (3d Cir. 1987), we stated that interpretive rules are not binding on the agency or the court. Likewise, in *American Ambulance Serv., Inc. v. Sullivan*, 911 F.2d 901, 908 (3d Cir. 1990), we opined that "[i]nterpretive rules are entitled to no more weight on judicial review than their inherent persuasiveness commands" (citing *Batterton v. Marshall*, 648 F.2d at 705). Indeed, in *FLRA*, we applied this standard of review to an interpretive rule announced in letter form and refused to give it controlling weight. 966 F.2d at 762-64 & n.14. I think the above line of cases makes it clear that neither the Supreme Court nor this court has recognized any erosion of *Skidmore* or *Gilbert*.

In *Snider*, we refused to apply *Chevron*, holding that the statute was unambiguous under step one of the test and

opining that "[c]omplexity alone is not enough to trigger *Chevron*." 29 F.3d at 902. We did, however, in evaluating the Secretary's position, look to one of the *Skidmore* factors to determine how much consideration to give to her interpretation. Because the Secretary had changed her position on the issue, we refused to give her interpretation "any deference," *id.*, although it is perhaps more accurate to say that we gave it consideration but not controlling weight.[9] In a similar vein is *Mazza v. Secretary of Health and Human Servs.*, 903 F.2d 953, 958-59 (3d Cir. 1990), in which, citing *Skidmore* and *Gilbert*, we rejected an agency interpretation that contradicted its earlier position.

One of our cases contains some language that superficially seems to support the majority's position. In *Kean v. Heckler*, 799 F.2d 895, 902 (3d Cir. 1986), we purported to defer under *Chevron* to an agency interpretation. Yet, we went on to consider factors normally relevant only in a *Skidmore-Gilbert* analysis, including the Secretary's alleged change in position, the fact that her interpretation was contemporaneous with the enactment of the statute, and the expertise of her agency. *Id.* at 902-03. Nowhere did we even intimate that *Chevron* had overruled *Skidmore* or *Gilbert*. In any event, even if *Kean* did hold that *Chevron* deference is required for agency interpretations, I conclude that it was implicitly overruled by the Supreme Court in *Martin* and *EEOC*.

Many other courts agree that *Skidmore-Gilbert* is the appropriate standard of review for interpretive rules. In

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[9]We give *consideration* to the agency's interpretation (which many courts refer to as deference), then we decide how much *weight* the interpretation should receive. To say that we give it "no deference" implies that we do not even consider it, which is not the case.

Atchinson, T. & S.F. Ry. v. Pena, 44 F.3d 437 (7th Cir. 1994) (en banc), *cert. granted*, No. 94-1592, 63 U.S.L.W. 3883, 3889, 1995 U.S. LEXIS 4064, 1995 WL 156485, (U.S. June 19, 1995), the court, while making clear that an interpretive rule is entitled to some deference, refused to "rubber stamp" the agency's action and rejected the contention that full *Chevron* deference applies to such rules. *Id.* at 442- 42. Instead, it applied the *Skidmore* factors and held that the interpretation deserved no deference.[10] Significantly, the court also held that any deference (consideration) due an interpretation must arise from "the agency's diligent study of the statute and the underlying activity it seeks to regulate." *Id.* at 443.

Similarly, in *Doe v. Reivitz*, 830 F.2d 1441 (7th Cir. 1987), a federal agency sent a letter to state welfare authorities restricting the eligibility of certain benefits from dependents of illegal aliens. The Secretary argued that his regulation was entitled to *Chevron* deference, but the court disagreed, opining:

> The documents at issue in this case are interpretive rather than legislative in nature, and under longstanding principles, agency interpretations are not entitled to the same degree of deference commanded by the high-powered regulations in *Chevron*. The Court in *Chevron* did not purport to alter the scope of review traditionally accorded interpretive documents.

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[10]Again, it would have been more accurate if the court had said that the interpretation would not be given controlling weight rather than it would be given no deference.

Id. at 1446 (citation omitted). It continued:

> HHS did not engage in notice-and-comment rule making in issuing its AFDC-UP eligibility policy. The agency cannot now contend that courts must accord to this policy the deference due a legislative rule when the agency has not followed the normal procedures associated with force-of-law rule making.

Id. The court then went on to analyze the interpretive rule under the *Skidmore* doctrine, refusing to give controlling weight to the rule on the grounds that the interpretation was not contemporaneous with the passage of the statute and the agency's reasoning was defective. *Id.* at 1447-51.[11]

Indeed, in the D.C. Circuit, the court of appeals has issued a number of opinions to the effect that interpretive

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[11]The overwhelming majority of the other federal courts of appeals has followed essentially the same reasoning. *See Kelley v. E.I. duPont de Nemours & Co.*, 17 F.3d 836, 841-42 (6th Cir. 1994) (policy statements and interpretive rulings not entitled to *Chevron* deference but are analyzed under *Skidmore* factors); *Motor Vehicle Mfrs. Ass'n v. New York State Dep't of Envtl. Conservation*, 17 F.3d 521, 534-35 (2d Cir. 1994) (no *Chevron* deference to EPA advisory circular); *Travelstead v. Derwinski*, 978 F.2d 1244, 1250 (Fed. Cir. 1992) (interpretive rules receive only *Skidmore* consideration); *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1228 (5th Cir. 1990) (interpretive rules not binding, relying on *Skidmore*); *Ohio*, 862 F.2d at 1235 (6th Cir.) (according only *Skidmore* consideration to interpretive rule; thoroughness evident in agency reasoning was "most unimpressive"); *Paxton v. Secretary of Health & Human Servs.*, 856 F.2d 1352, 1356-57 (9th Cir. 1988) (interpretive rule not given *Chevron* deference); *St. Luke's Hosp.*, 810 F.2d at 331-32 (1st Cir.) (interpretation of even ambiguous statute given only *Skidmore* consideration); *Capitano v. Secretary of Health & Human Servs.*, 732 F.2d 1066, 1075-76 (2d Cir. 1984) (rule treated as interpretive failed *Skidmore* analysis); *Frank Diehl Farms v. Secretary of Labor*, 696 F.2d 1325, 1329-30 (11th Cir. 1983) (interpretive rules get less deference than legislative rules, citing *Skidmore*).

rules do not receive full *Chevron* deference, but, at most, *Skidmore* consideration. As one panel said, "[a] binding policy is an oxymoron." *Vietnam Veterans of Am. v. Secretary of the Navy*, 843 F.2d 528, 537 (D.C.Cir.1988). In *Samaritan Health Serv. v. Bowen*, 811 F.2d 1524 (D.C.Cir.1987), the court stated:

> While substantive rules are typically characterized as having the force and effect of law, interpretive rules enjoy a lesser deference-doubtless in part because of the absence of public opportunity to comment.... Any deference that an interpretive rule may claim depends on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

Id. at 1529 (quoting *Skidmore*) (some citations and internal quotation marks omitted); *accord American Fed'n of Labor v. Donovan*, 757 F.2d 330, 341-42 (D.C.Cir.1985) (interpretive rule, while receiving "some" deference, does not receive full deference); *Batterton*, 648 F.2d at 702 (nonlegislative rules carry no more weight than their inherent persuasiveness commands).

The majority, however, relies on *Health Ins. Ass'n of Am., Inc. v. Shalala*, 23 F.3d 412, 424 & n.8 (D.C. Cir. 1994), cert. denied, ___ U.S. ____, 115 S. Ct. 1095 (1995), for the proposition that *Chevron* "deference is appropriate even though the Secretary's interpretation is not contained in

a 'legislative rule.' " *See* majority typescript at 23.[12] There, because the parties agreed that *Chevron* applied, the court did not reach the issue, but stated in dictum that it had "often applied *Chevron* deference to interpretive rules without comment." *Id.* at 424 n.8 (citing two cases).

One of the cases the *Health Insurance* court relied on is *Wagner Seed Co. v. Bush*, 946 F.2d 918 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 970, 112 S. Ct. 1584 (1992), in which the EPA issued a rule in a decision letter rather than by notice and comment rulemaking. *Id.* at 921. The court stated that "it is simply not the law of this circuit that an interpretive regulation does not receive the *Chevron* deference accorded a legislative regulation." *Id.* at 922. Nowhere in its opinion, however, did it address its prior contrary holdings, discussed above, and the cases it relied upon are opaque at best concerning deference to interpretive rules. And notably, although *Wagner Seed* was decided shortly after the Supreme Court's decisions in *Martin* and *EEOC*, the court addressed neither of these cases in its opinion.

The other case cited in *Health Insurance* is *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1566-67 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1074, 105 S. Ct. 2153 (1985). In that case, which was decided only three months after *Chevron*, the court did apply *Chevron* deference to an interpretive rule, but again, without analyzing its prior holdings to determine whether they survived *Chevron*. In any event, *General Motors* was decided before the Supreme

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[12]The majority also relies on *Hicks v. Cantrell*, 803 F.2d 789, 793-94 (4th Cir. 1986). There, and with very little analysis, the court held that *Chevron* deference was owed to an agency interpretation. Because of *Hicks*' minimal reasoning and its conflict with the overwhelming majority of courts that have considered the same issue (including the Supreme Court), I simply would not follow it.

Court's decisions in *Martin* and *EEOC* and cannot survive them.

At best, then, these cases indicate an intra-circuit split of authority in the D.C. Circuit on the question of deference to interpretive rules. Given the weight of authority against granting *Chevron* deference to interpretive rules, I am not persuaded by *Health Insurance* and the two cases it cites.

As final support for its holding that interpretive rules are entitled to *Chevron* deference, the majority relies on the Supreme Court's recent decision in *Reno v. Koray*, ___ U.S. ____, 115 S. Ct. 2021 (1995), *rev'g Koray v. Sizer*, 21 F.3d 558 (3d Cir. 1994). *See* majority typescript at 23. Careful examination of that case reveals it to be inapposite.

In *Koray*, we held that time served by a defendant in a halfway house may constitute time spent in official detention, entitling him to credit against his sentence under 18 U.S.C. §3585(b). *Id.* at 567. We declined to grant full *Chevron* deference to Bureau of Prisons internal agency guidelines. *Id.* at 562. We did, however, citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42, 103 S. Ct. 2856, 2866 (1983), accord "some deference" to the extent the agency "engaged in the necessary 'reasoned' analysis of this issue." *Id.* Although that inquiry bears some similarity to a *Skidmore* analysis, we did not cite or apply *Skidmore*, *Gilbert*, *Martin*, or *EEOC* in *Koray*. Then, based entirely on the plain language of the statute, we held that the words "official detention" did not mean, as the government argued, "official detention *by the Attorney General or the Bureau of Prisons*." *Id.* at 563-64.

Our analysis in *Koray* was entirely within *Chevron* step one: whether Congress had plainly spoken to the issue,

and the "deference" (really consideration) we gave the agency interpretation was likewise an aid to our step one analysis. *See Michael Herz, Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 Admin. L.J. 187, 208-09 (1992) (*Skidmore* analysis is a part of *Chevron* step one). We simply never reached *Chevron* step two.

Neither did the Supreme Court. In reversing our decision, the Court examined a number of related statutes using the phrase "official detention." 115 S. Ct. at 2025-26. Based entirely on its construction of §3585(b) *in pari materia* with the other statutes and on the legislative history, the Supreme Court concluded that "the Bureau's interpretation is the most natural and reasonable reading of §3585(b)'s 'official detention' language." *Id.* at 2027.

The Supreme Court's decision in *Koray* is a classic *Chevron* step one holding; the Court construed the statute in accordance with the clear intent of Congress, and concluded that our construction was erroneous. Because the statute was not ambiguous, the Court simply did not reach step two of the *Chevron* analysis. The Court stated only that the agency's interpretive rule "is still entitled to *some* deference, since it is a permissible construction of the statute[,]"[13] *id.* (emphasis added) (citations and internal quotation marks omitted), opining that "it would be too much to say that the statute

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[13]This language is taken from *Chevron*, 467 U.S. at 843, 104 S. Ct. at 2782, where the Court sets forth step two of the *Chevron* test. Because *Koray* is a step one case, I conclude that the use of that quotation amounts to, at most, an "imprecision in the Court's language," not an implicit part of its holding. *See Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244, 1250 (3d Cir. 1993).

cannot bear the interpretation adopted by the Bureau." *Id.* (citation and internal quotation marks omitted).[14]

It is important not to read too much into this language, however. Both courts agreed that the agency's interpretation was entitled to "some deference." 115 S. Ct. at 2027; 21 F.3d at 562. I believe all the Supreme Court told us in *Koray* was that, because the agency's construction of the statute best reflected the clear intent of Congress, we should have give it controlling weight. *Koray* did not hold that the statute was ambiguous or that there was a delegation of authority to the agency to fill a gap in the statutory scheme. Because of that, as discussed earlier, *Koray* simply is not a step two case.[15]

In addition, the *Koray* Court did not overrule, limit or even criticize its earlier decisions in *Skidmore*, *Morton*, *Gilbert*, *Martin* or *EEOC*. I therefore disagree with the

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[14]The Court quoted *Sullivan v. Everhart*, 494 U.S. 83, 91-92, 110 S. Ct. 960, 965-66 (1990). There, recipients of federal benefits challenged the Secretary's "netting" regulations, which were promulgated as *legislative* rules. The recipients proffered a plausible construction but the court held--deferring under step two of *Chevron*--that at most, the recipients proved that the statute could bear their construction, but not that it could *not* bear the Secretary's construction. That, according to the Court, was insufficient. While the Court's reasoning was certainly applicable to a step two case, *Koray* and this case arise under *Chevron* step one, which has a less-deferential standard.

[15]Compare *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, No. 94-859, 63 U.S.L.W. 4665, 115 S. Ct. ____, 1885 U.S. LEXIS 4463, 1995 WL 382088 (U.S. June 29, 1995). There, the agency promulgated a proper legislative rule giving further meaning to the statutory term "take" under the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* While the Supreme Court engaged in an analysis of the text and legislative history of the Act, in the final analysis, it decided that "Congress did not unambiguously manifest its intent" to contradict the government's view of the statute. The Court accordingly deferred to the "reasonable" interpretation of the agency. 63 U.S.L.W. at 4670. *Sweet Home*, in contrast to *Koray*, clearly implicated *Chevron* step two.

majority's implicit assertion that the Supreme Court in *Koray* overruled all of those cases *sub silentio*. Had the Supreme Court intended to make such a sweeping change in administrative law jurisprudence, it would have done so explicitly. I conclude that the Supreme Court's opinion in *Koray* cannot support such a conclusion. *See Neely v. Club Med Management Servs., Inc.*, Nos. 93-2069, 93-2102, ____ F.3d ____, 1995 U.S. App. LEXIS 19904, *26, 1995 WL 442169, *9 (3d Cir. July 26, 1995) (in banc) (mere ambiguity in Supreme Court opinion insufficient to change existing decisional law). I therefore conclude that *Skidmore* and *Gilbert*, not *Chevron* step two, provide the appropriate standard of review for interpretive rules.

B.

Under the standard enunciated in *Skidmore*, these two letters, to which we are asked to defer, do not fare well. In *Skidmore*, the Supreme Court focused on "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. at 140, 65 S. Ct. at 164. It is also appropriate to consider whether the agency's interpretation is contemporaneous with the passage of the statute and has been in long use. *Davis v. United States*, 495 U.S. 472, 484, 110 S. Ct. 2014, 2022 (1990). Finally, we may examine whether the agency has developed expertise over the subject matter at issue. *See Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-52, 110 S. Ct. 2668, 2679 (1990) (agency expertise is a principal justification for deference); *Kelley*, 17 F.3d at 842; *Colorado Pub. Utilities Comm'n v. Harmon*, 951 F.2d 1571, 1578-79 (10th Cir. 1991); *West*, 879 F.2d at 1136-37

(Mansmann, J., concurring and dissenting); *Capitano*, 732 F.2d at 1076; *Mathews*, 590 F.2d at 1259.

First of all, it is apparent that the agency did not thoroughly consider the issue of reporting and certification requirements. In the two letters to state Medicaid directors, the agency provides no explanation at all why states must have a waiver provision. Other than the explanation it offers in its amicus brief (which we requested), the agency offers no justification for its rule. This is similar to the situation the court faced in *Mathews*, 590 F.2d at 1258, where the court rejected the agency's interpretation.

Even in her brief, the Secretary states only that lack of a waiver provision *could* become an "insuperable barrier" to victims of rape and incest seeking Medicaid-funded abortions, relying entirely on the fact that rape is a "vastly underreported" crime. This is both speculative and shallow reasoning, and, in any event, is nothing more than a litigating position entitled to no weight. *See Martin*, 499 U.S. at ____, 111 S. Ct. at 1179; *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212, 109 S. Ct. 468, 473-74 (1988). Fundamentally, I remain unconvinced that the Secretary has really taken the necessary "hard look" at this question. *See Greater Boston Television Corp. v. Federal Communications Comm'n*, 444 F.2d 841, 851-52 (D.C. Cir. 1970) ("hard look" necessary to satisfy reviewing court that agency action not based on "impermissible whim, improper influence or misplaced zeal"), *cert. denied*, 403 U.S. 923, 91 S. Ct. 2233 (1971).

Second, although the agency's position is temporally fairly close to the enactment of the 1994 Hyde Amendment, it is not one of long-standing. This factor, accordingly, does not favor according any deferential weight to the agency's

interpretation. *See Davis*, 495 U.S. at 484, 110 S. Ct. at 2022; *Kelley*, 17 F.3d at 842 (refusing to give weight to contemporaneous interpretation not in long use); *see also Pena*, 44 F.3d at 445 (Easterbrook, J., concurring) (long-standing interpretations entitled to more weight only because they shed light on the meaning of the statute when enacted); Richard A. Posner, *The Federal Courts: Crisis and Reform* 279-80 (1985) (view of current administration, in the absence of long-standing, consistent interpretation, not entitled to weight).

Finally, I turn to the issue of agency expertise. If this case involved any of the issues we typically review under the Medicaid Act, I would be the first to say that the Secretary has developed a tremendous amount of it. That is not the case here, however. Under the Hyde Amendment, funding for abortion, even in cases of rape and incest, was forbidden from 1982 through 1993. Quite simply, abortion of pregnancies caused by rape and incest is not something the agency has had to deal with within recent institutional memory. And it certainly is no expert on the criminology of rape and incest reporting. It therefore lacks any comparative advantage vis-a-vis this court with respect to the issue at hand. I would therefore not accord the agency's interpretation controlling weight. *See Hi-Craft Clothing*, 660 F.2d at 915; *Mathews*, 590 F.2d at 1259; *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1333-34 (3d Cir. 1987) (Weis, J., concurring).

C.

My conclusion is philosophically annealed by the fact that the agency's letters do not merely regulate a private party: they attempt to preempt a state statute. One of the reasons for *Chevron* deference is that "federal judges--who

have no constituency--have a duty to respect legitimate policy choices made by those who do." *Chevron*, 467 U.S. at 866, 104 S. Ct. at 2793. The argument is that agencies, which at least in theory are indirectly responsive to majoritarian pressure, are more legitimate policy makers than Article III courts. With respect to regulation of private party conduct, that theory holds reasonably true; agencies are at least the delegates of the Congress and are often the subordinates of the Executive. It is no secret, however, that what is true in theory may be less so in practice; because of superior expertise and "agency capture," actual agency action may be less majoritarian than we might hope. *See* Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-Chevron Era*, 32 B.C. L. Rev. 757, 814 (1991). Even so, it is reasonable in such circumstances to favor the policy choices of agency heads rather than judges.

That situation shifts considerably, however, in the context of preemption. There, the two alternative policymakers are: (1) unelected and only theoretically accountable bureaucrats on one side of the balance; and (2) the elected state legislators on the other. That is our case, and I think the balance tips sharply in favor of upholding state law; not a federal agency's interpretation. Under the Supremacy Clause, a federal agency only has the power to preempt when it clearly, conscientiously and lawfully exercises its delegated authority under §553 of the APA, not when it issues an interpretive rule. *Cf. Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503, 108 S. Ct. 1350, 1355 (1988) ("a clear and manifest [federal] purpose is always required" for preemption); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157, 98 S. Ct. 988, 994 (1978) (same).

Indeed, under the law of this circuit, an interpretive rule cannot preempt state law. *See United States v. Walter Dunlap & Sons, Inc.*, 800 F.2d 1232, 1239 (3d Cir. 1986) ("Because the regulations on which FmHA relies do not have the force of a congressional directive and because there is no indication that Congress intended an agency regulation to supersede long-standing uniform state law in this area, we decline to accept the government's position that the regulations control."). This makes good logical sense, because it takes law to displace law, and an interpretive rule simply lacks the force of law. Other courts and commentators appear to be in accord. *See* Koch & Wright, *supra*, §3.59, at 73-74 (Supp.1995) (citing *South Central Bell Tel. v. Louisiana Pub. Serv. Comm'n*, 744 F.2d 1107 (5th Cir. 1984), *vacated on other grounds*, 476 U.S. 1166, 106 S. Ct. 2884 (1986); *New England Tel. & Tel. Co. v. Public Utilities Comm'n*, 742 F.2d 1, 11 (1st Cir. 1984), *cert. denied*, 476 U.S. 1174, 106 S. Ct. 2902 (1986)).

IV.

That brings me finally to Pennsylvania's second physician certification requirement. Unlike the agency's two letters explaining its interpretation of reporting and certification requirements, here the Secretary promulgated a valid legislative rule with the force of law. *See* 42 C.F.R. §441.203 (speaking in terms of "a physician") Her interpretation, therefore, would appear to flow directly from the text of her regulation, merely reminding states of an existing duty.

I do not believe, however, that Congress ever delegated any authority for the Secretary to make such a rule. I recognize that the Secretary has "exceptionally broad authority" to interpret the Medicaid Act itself, *Schweiker v.*

Gray Panthers, 453 U.S. 34, 43, 101 S. Ct. 2633, 2640 (1981); *see* majority typescript at 26, but the Medicaid Act is not at issue here. The statutory text under interpretation is the Hyde Amendment to the appropriations bill that funds the Medicaid program, and there is not one scintilla of evidence in the Hyde Amendment that Congress intended the Secretary to interpret either the scope and extent of her appropriation or the validity of state-imposed second physician certification requirements. Unlike most substantive statutes administered by regulatory agencies, the Hyde Amendment contains no provision enabling the Secretary to make regulations with the force of law. At best, it is silent on the issue. The mere fact of legislative silence, however, does not necessarily imply the existence of a deliberate "gap" in the statute, much less a gap that we must infer Congress intended the Secretary to fill through administrative regulation.[16] Because there was no delegation, the regulation upon which the majority relies is properly treated only as an interpretive rule. *See EEOC*, 499 U.S. at ____, 111 S. Ct. at 1235; *Gilbert*, 429 U.S. at 141-42, 97 S. Ct. at 410-11; *Batterton*, 648 F.2d at 705.

Applying a *Skidmore* analysis to 42 C.F.R. §441.203, it would probably, under normal circumstances, be entitled to

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[16]*See, e.g., Railway Labor Executives' Ass'n v. National Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc) (presuming a delegation would enable agencies to "enjoy virtually limitless hegemony"); *West*, 879 F.2d at 1138 (Mansmann, J., concurring and dissenting) (mere silence or ambiguity does not automatically imply delegation to the agency); Weis, *supra*, at 305 ("If Congress has not clearly delegated a properly circumscribed power, then the agency should not obtain untrammeled discretion through legislative silence."); Herz, *supra* at 204 ("Courts should not equate a mere lack of clarity with a delegation of decision-making authority to the agency."); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 445 (1989) ("An ambiguity is simply not a delegation of law-interpreting power."); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 467 (1987) (same).

controlling weight. The regulation, after all, was enacted soon after the first Hyde Amendment was passed in 1977, and has not changed since. Moreover, because the Hyde Amendment has always permitted funding for Medicaid abortions where the life of the mother would otherwise be endangered, the agency does have considerable expertise in this area. Ordinarily, then, I would agree with the majority that the Secretary's interpretation is controlling.

As I have already discussed in Part III(C), however, this is a preemption case, and an interpretive rule cannot preempt state law. *Dunlap*, 800 F.2d at 1239. Accordingly, I would uphold Pennsylvania's second physician certification requirement.

V.

Because the majority incorrectly defers under *Chevron* to the Secretary's interpretations, and because there is no basis for its holding in the Hyde Amendment itself, I dissent.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Filed: September 15, 1994

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN, et al. : CIVIL ACTION

v. :

CATHERINE BAKER KNOLL, et al. : No. 94-CV-0169

Before: FULLAM, Senior District Judge.

MEMORANDUM AND ORDER

FULLAM, Sr. J.

Plaintiffs, who plainly have standing to do so, seek to invalidate certain provisions of the Pennsylvania Abortion Control Act dealing with the funding of abortions under the Medicaid program. States which participate in the Medicaid program are required to administer the program (i.e., distribute the federal funds and state matching funds) in conformity with federal law.

Under applicable federal law--the current version of the Hyde Amendment, which became effective October 1, 1993--participating states are required to pay for abortions when "necessary to save the life of the mother" or when "the pregnancy is the result of an act of rape or incest". The Pennsylvania statute now challenged, 18 Pa.C.S.A. §§3215(c) and (j) (supp. 1993) provides:

> (c) PUBLIC FUNDS - No Commonwealth funds and no federal funds which are appropriated by the Commonwealth shall be expended by any state or local government agency for the performance of abortion, except:
>
> (1) When abortion is necessary to avert the death of the mother on certification by a physician. When such physician will perform the abortion or has a pecuniary or proprietary interest in the abortion, there shall be a separate certification from a physician who has no such interest.

(2) When abortion is performed in the case of pregnancy caused by rape which, prior to the performance of the abortion, has been reported, together with the identity of the offender, if known, to a law-enforcement agency having the requisite jurisdiction and has been personally reported by the victim.

(3) When abortion is performed in the case of pregnancy caused by incest which, prior to the performance of the abortion, has been personally reported by the victim to a law-enforcement agency having the requisite jurisdiction, or, in the case of a minor, to the county child protective service agency and the other party to the incestuous act has been named in such report.

* * *

(j) REQUIRED STATEMENT -- No Commonwealth agency shall make any payment from federal or state funds appropriated by the Commonwealth for the performance of any abortion pursuant to subsection (c)(2) (3) unless the Commonwealth agency first:

(1) received from the physician or facility seeking payment a statement signed by the physician performing the abortion stating that, prior to performing the abortion, he obtained a non-notarized, signed statement from the pregnant woman stating that she was a victim of rape or incest, as the case may be, and that she reported the crime, including the identity of the offender, if

known, to a law enforcement agency having the requisite jurisdiction or, in the case of incest where a pregnant minor is the victim, to the county child protective service agency stating the name of the law enforcement agency or child protective service agency to which the report was made and the date such report was made;

(2) receives from the physician or facility seeking payment, the signed statement of the pregnant woman which is described in paragraph (1). The statement shall bear the notice that any false statements made therein are punishable by law and shall state that the pregnant woman is aware that false reports to law enforcement authorities are punishable by law.

It is thus clear that, whereas the Hyde Amendment restricts abortion funding to cases of rape or incest, or where continuation of the pregnancy would endanger the life of the mother, the Pennsylvania statute imposes additional limitations. To the extent of these additional limitations, therefore, the Pennsylvania statute is invalid, under familiar pre-emption principles. This case is squarely governed by the decision of the Third Circuit Court of Appeals in Roe v. Casey, 623 F.2d 829 (3d Cir. 1980), by which this court is obviously bound.

Virtually identical issues under other state statutes or constitutional provisions have invariably been decided the same way. See, e.g., Roe v. Casey, supra; Hodgson v. Board of County Commissioners, 614 F.2d 601 (8th Cir. 1980); Zbaraz v. Quern, 596 F.2d 196 (7th Cir. 1979), cert. denied

448 U.S. 907 (1980); PreTerm, Inc. v. Dukakis, 591 F.2d 121 (1st Cir.), cert. denied, 441 U.S. 952 (1979). See also, Hearn v. Beye, ___ F.2d ___ (D. Colo. Civ. No. 93-2350, May 5, 1994).

In support of the Pennsylvania statute, the defendants argue that the additional reporting requirements merely further Pennsylvania's legitimate interest in ferreting out and prosecuting cases of rape or incest. Assuming that to be true--although one may wonder why only impecunious women should be prodded into reporting such crimes--it is nevertheless unarguably clear that imposing additional limitations on a federal funding program is not a permissible vehicle for achieving that law-enforcement objective. The same observation applies to the other justification advanced by the defendants, namely, the need to weed out fictitious claims of rape, incest, or life-threatening necessity. Even assuming the validity of the doubtful proposition that persons who would readily lie to their doctors would not also lie to the authorities, or that a single physician is significantly more likely to lie than two physicians, there are other ways of insuring fiscal accountability in these matters without imposing additional obstacles to the federal/state funding program contemplated by Congress.

It should be unnecessary, in view of the compelling force of the judicial decisions cited above, to point out that the same kinds of reporting and certification requirements set forth in the Pennsylvania statute had appeared in earlier versions of the Hyde Amendment. They were removed in the current version, and efforts by abortion opponents to include them were rejected by Congress. See 139 Cong.Rec. H.4304 (daily ed. June 30, 1993). The fact that the ultimate rejection may have occurred on a procedural vote--the argument was that the reporting requirements were substantive and therefore

should not be included in an appropriations measure--does not detract from the persuasiveness of the legislative history as a clear indication of Congressional intent to eliminate the requirements under discussion.

Finally, the defendants' argument that plaintiffs are precluded from success in this litigation because of the res judicata consequences of the decision of the Pennsylvania Commonwealth Court in Fischer v. DPW, 543 A.2d 177 (Pa. Cmnwlth Ct. 1988), is totally without merit. Plaintiffs were not parties to that litigation; the issue of federal pre-emption neither was, nor could have been, asserted in that litigation; and there was no final judgment on the merits. The court merely ruled, on an application for a preliminary injunction, that the reporting requirements did not (probably did not?) infringe a woman's right of privacy under the Pennsylvania Constitution. The fact that statutory requirements may not violate a state constitutional right is irrelevant to the issue of federal pre-emption posed in this litigation.

In conformity with the decision of the Court of Appeals in Roe v. Casey, supra, the defendants will be enjoined from enforcing the challenged sections of the Pennsylvania Abortion Control Act, 18 Pa.C.S.A. §§3215(c) and 3215(j) so long as Pennsylvania continues to participate in the Medicaid program.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN, et al. : CIVIL ACTION

v. :

CATHERINE BAKER KNOLL, et al. : No. 94-CV-0169

ORDER

AND NOW, this 15th day of September, 1994, it is ORDERED:

1. Plaintiffs' motion for summary judgment is GRANTED.

2. It is ORDERED, ADJUDGED AND DECLARED that §§3215(c) and 3215(j) of the Pennsylvania Abortion Control Act are invalid, as in conflict with federal law.

3. The defendants are enjoined from enforcing §§3215(c) and 3215(j) of the Pennsylvania Abortion Control Act, so long as Pennsylvania continues to participate in the Medicaid program.

/s/ John P. Fullam
Sr.J.

Entered 9/16/94
Clerk of Courts

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 94-1954

ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN; GREATER PHILADELPHIA WOMEN'S MEDICAL FUND; CHOICE, on behalf of themselves and the Medicaid-eligible women of the Commonwealth of Pennsylvania to whom they provide financial, health care and counseling services

v.

CATHERINE BAKER KNOLL, Treasurer of the Commonwealth of Pennsylvania, in her official capacity; KAREN F. SNIDER, Secretary of Public Welfare of the Commonwealth of Pennsylvania, in her official capacity; SHERRY KNOWLTON, Deputy Secretary of the Office of Medical Assistance of the Commonwealth of Pennsylvania, in her official capacity; ROBERT P. CASEY, Governor of the Commonwealth of Pennsylvania, in his official capacity, and their successors

Catherine Baker Knoll, Karen F. Snider,
Sherry Knowlton and Robert P. Casey,

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MC KEE, and SAROKIN, Circuit Judges

The petition for rehearing filed by appellants having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Becker, Judge Stapleton, Judge Mansmann, Judge Hutchinson, Judge Nygaard, Judge Roth and Judge Sarokin would have granted rehearing in banc.

By the Court,

/s/ Robert E. Cowen
Circuit Judge

Dated: AUG 24 1995

DEPARTMENT OF HEALTH & HUMAN SERVICES
Health Care Financing Administration
6325 Security Boulevard
Baltimore, MD 21207

December 28, 1993

Dear State Medicaid Director:

The purpose of this letter is to notify you about a recent Congressionally enacted revision to the "Hyde Amendment" which affects the Medicaid program and to tell you how this revision in the law is to be implemented.

Effective October 1, 1993, as part of P.L. 103-112, the Health and Human Services Appropriation bill, Congress passed a revision of the Hyde Amendment pertaining to Federal funding of abortions under the Medicaid program. As enacted, the provision states:

> None of the funds appropriated under this Act shall be expended for any abortion except when it is made know to the Federal entity or official to which funds are appropriated under this Act that such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest.

Thus, Federal funding (FFP) is now available for abortions performed to save the life of the mother or to terminate pregnancies resulting from rape or incest when the claim for such an abortion is paid by the State on or after October 1, 1993. Please note that it is the date that the State pays the

claim and not the date of the service which determines the availability of FFP.

In order to implement this provision of the law, we are requesting that beginning with the first Quarterly Expenditure Report (HCFA-64) for fiscal year (FY) 1994 in January, States submit to the Health Care Financing Administration (HCFA) regional office (RO) a form certifying the number of abortions for which FFP is being claimed. The form should outline the number of abortions performed to save the life of the mother, the number performed for a pregnancy resulting from an act of rape, and the number performed for a pregnancy resulting from an act of incest. This certification should be submitted to the RO on a quarterly basis with the completed HCFA-64.

Current regulations at 42 CFR 441.203 and 441.206 require that before FFP can be made available, the State must obtain a signed physician's certification that, based on the professional judgment of the physician, the abortion was necessary because "the life of the mother would be endangered if the fetus were carried to term." Because the language of the current Hyde Amendment differs somewhat from its predecessors, the State must change the wording of the physician's certification to comport with the current statutory language. With regard to this portion of the Hyde Amendment, the new legislative language, "to save the life of the mother", has essentially the same meaning as the previous legislation.

As with all other mandatory medical services for which Federal funding is available, States are required to cover abortions that are medically necessary. By definition, abortions that are necessary to save the life of the mother are medically necessary. In addition, Congress this year added

abortions for pregnancies resulting from rape and incest to the category of medically necessary abortions for which funding is provided. Based on the language of this year's Hyde Amendment and on the history of Congressional debate about the circumstances of victims of rape and incest, we believe that this change in the text of the Hyde Amendment signifies Congressional intent that abortions of pregnancies resulting from rape or incest are medically necessary in light of both medical and psychological health factors. Therefore, abortions resulting from rape or incest should be considered to fall within the scope of services that are medically necessary.

The definition of rape and incest should be determined in accordance with each State's own law. States may impose reasonable reporting or documentation requirements on recipients or providers, as may be necessary to assure themselves that an abortion was for the purpose of terminating a pregnancy caused by an act of rape or incest. States may not impose reporting or documentation requirements that deny or impede coverage for abortions where pregnancies result from rape or incest. To insure that reporting requirements do not prevent or impede coverage for covered abortions, any such reporting requirement must be waived and the procedure considered to be reimbursable if the treating physician certifies that in his or her professional opinion, the patient was unable, for physical or psychological reasons, to comply with the requirement.

States which have State Plan language more restrictive than that provided for under the revised Hyde Amendment may qualify for Federal funding for the first quarter of FY 94 if they submit approvable State Plan language changes by December 31, 1993.

By March 31, 1994, all States must ensure that their State Plans do not contain language that precludes FFP for abortions that are performed to save the life of the mother or to terminate pregnancies resulting from rape or incest.

As you know, it is necessary for States to adhere to all conditions for Federal Medicaid funding. As part of its ongoing State assessment and audit programs, HCFA may include reviews of abortion claims, if necessary, to assure compliance with these conditions.

Please call my office if you have any questions about this matter.

Sincerely yours,

/s/ Sally K. Richardson
Sally K. Richardson
Director
Medicaid Bureau

cc: All Regional Administrators

DEPARTMENT OF HEALTH & HUMAN SERVICES
Health Care Financing Administration
6325 Security Boulevard
Baltimore, MD 21207

Mar 25 1994

Dear State Medicaid Director:

On December 28, 1993 I wrote to notify you about the Congressionally enacted revision to the "Hyde Amendment" which governs Federal funding of abortions. My letter described the requirements of the new law and explained how its provisions were to be implemented by States. Since that time, we have received a number of questions regarding implementation of the law. The purpose of this letter is to provide guidance to all States in the areas identified by those questions.

We have been asked if the change in the language of the most recent "Hyde Amendment" signifies a change in what is meant by "to save the life of the mother." We do not believe that Congress intended any change in this category of abortion coverage. Therefore, States should continue to apply the same criteria in identifying these cases as were previously used. As before, a physician certification indicating that, on the basis of the physician's professional judgment, the life of the mother would be endangered if the fetus were carried to term, must be submitted to the State Medicaid agency. The certification must contain the name and address of the patient and must be signed by the physician. It is important to note that there are no exceptions to this certification requirement. A diagnosis code on the claim form may <u>not</u> be used in lieu of the above-described certification to document abortions performed to save the life of the mother.

With regard to the new provisions on abortions performed following rape or incest, HCFA will not require that any specific form(s) be used to document such cases. The State is free to use any form or forms it chooses. Furthermore, HCFA will not require that any documentation be submitted to us for review prior to making payment for abortions resulting from rape or incest or those performed to save the life of the mother. However, we do expect that documentation of the circumstances of these cases will be maintained in the medical records or in the records of the agencies to which cases of rape or incest must be reported (if any).

Similarly, HCFA will not establish a timeframe within which cases of rape or incest must be reported to a law enforcement or other agency. State law or policy should dictate when and to whom a rape or a case of incest must be reported. However, as noted in my December 28 letter, the State-established reporting requirements may not serve as an additional coverage requirement to deny or impede payment for abortions where pregnancies result from rape or incest.

The State must establish procedures which permit the reporting requirements to be waived, and the procedure reimbursed, if the treating physician certifies that, in his or her professional opinion, the patient was unable, for physical or psychological reasons, to comply with the reporting requirements.

We have also been asked whether States must claim FFP for the abortion services specified by the "Hyde Amendment." No State is compelled to claim FFP for abortion services. However, a State must provide abortion services to Medicaid recipients in accordance with the law even if the State chooses to claim no Federal monies for those services.

A number of questions were raised concerning the circumstances under which States must amend their Title XIX State plans to conform to the law. States with plans that currently make no mention of abortion coverage need not amend their plans in any way. States with plans which do not provide for coverage of abortion services in accordance with the "Hyde Amendment" must modify those plans to bring them into conformance with the law by March 31, 1994.

We recognize the difficulties that some States face because of State laws that may conflict with the current Medicaid requirements. We are willing to work with those States that demonstrate their willingness to take the necessary steps to bring their programs into compliance with Federal requirements in order to avoid any unnecessary disruption of ongoing programs.

However, States that have non-conforming plans after March 31, 1994, and States that indicate they will rely on conflicting State law as a basis for their continuing noncompliance, will be subject to the compliance process applicable to all Title XIX mandates.

You should be aware that individuals participating in your Medicaid programs may claim entitlement to the Federal benefits that are currently provided under that program, including payment for an abortion that results from an act of rape or incest. Federal courts that have considered this issue in the past have held that State law impediments cannot stand in the way of an individual's entitlement under a State's Medicaid program to medically necessary services, including abortions, for which Federal funds are available. These holdings would apply regardless of the status of any proceedings between the Department and a State with respect to its conformity with current Federal requirements.

I hope that this information is helpful to you in complying with the requirements of the law. Please call my office if you have any questions about this matter.

Sincerely yours,

/s/ Sally K. Richardson
Sally K. Richardson
Director
Medicaid Bureau

cc:
All Regional Administrators